In The

Supreme Court of the United States

October Term, 1974

FILED
OCT 17 1974
MICHAEL RODAK, JR., C

No. 74-445

ANTHONY HASWELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES W. SCHOENEMAN
SCHOENEMAN & RALSTON
Attorneys for Petitioner
11800 Sunrise Valley Drive
Reston, Virginia 22091

(7675)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	6
Reasons for Granting the Writ	9
Conclusion	22

TABLE OF CITATIONS

Cases Cited:

Alexander v. Americans United Inc., ____U.S.____, 40 L. Ed. 2d 315 (1974) 3, 9, 12, 20, 21

Cammarano v. United States, 358 U.S. 498, 512 (1959) . 9, 13, 14

Golden Rule Church Assn., 41 T.C. 719 (1964) 14

Schapiro v. Thompson, 394 U.S. 618 (1969) 16

Speiser v. Randall, 357 U.S. 513 (1958) 9, 13, 14

Contents

Page

Statutes Cited:

Internal Revenue Code:

Section 170 7

Section 170(a) 6

Section 170(a)(1) 4

Section 170(c) 6, 20

Section 170(c)(2) 4, 11

Section 170(c)(2)(B) 8

Section 170(c)(2)(D) 1, 7, 8, 11

Section 501(c)(3), (5), (19) 11, 15, 20

Section 162(e) 15, 16

United States Constitution Cited:

First Amendment 3, 10, 14, 21

Fifth Amendment 3, 16, 20, 21

Contents

Page

Rules and Regulations Cited:

Treasury Regulations:

Section 1.501(c)(3)(iv) 11

Section 53.4945-2(d)(1)(ii) 11

Rule 134(b) 7

Other Authorities Cited:

Webster's Third New International Dictionary, (1966) at 1538 12

S. Rept. No. 1881, 87 Cong. 2nd Sess. (1962) 16

Troyer, Charities, Law-Making and the Constitution; The Validity of the Restrictions on Influencing Legislation, 31 N.Y.U. Tax Institute 1415 (1973) 20

Hearings-Legislative Activity by Certain Types of Exempt Organizations, pp. 6-9 20

APPENDIX

Appendix A — Opinion of United States Court of Claims . 1a

Appendix B — Findings of Fact 27a

In The

Supreme Court of the United States

October Term, 1974

No.

ANTHONY HASWELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Anthony Haswell, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in the above-entitled case denying the deductibility for federal income tax purposes of contributions to the National Association of Railroad Passengers because of its legislative activities and thereby upholding the constitutionality of the legislative restriction in Section 170(c)(2)(D) of the Internal Revenue Code of 1954.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Claims under date of July 19, 1974 which is not yet reported, with a separate concurring opinion by Judge Nichols of the Court, is set forth in Appendix A. Said opinion adopted the opinion of the Trial Judge Harkins. The Trial Judge's findings of fact, also adopted by the Court of Claims are set forth in Appendix B.

JURISDICTION

The judgment of the United States Court of Claims (Appendix A) was entered on July 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

Petitioner was denied federal income tax deductions for his contributions to an educational organization by the Court of Claims because a "substantial part" of the organization's activities was deemed legislative under the applicable tax exemption provision of the Code and because that provision of federal statutory law was deemed constitutional. The questions presented by this petition are:

> (1) Is the 40-year old statutory legislative restriction on exempt educational organizations that no "substantial part" of their activities may so consist constitutionally void for vagueness?

(2) Is the restriction on the legislative activities of educational organizations constitutional under the First and Fifth Amendments when the statute places no restrictions on others similarly situated?

(3) Did a substantial part of this organization's legislative activities constitute "influencing legislation" which is restricted by the statute? Or did they constitute nonpartisan analysis study or research, permissible under the applicable Treasury Regulations?

The Assistant Attorney General has previously indicated before this Court that the Internal Revenue Service and Justice Department would welcome a decision by this Court on these questions.[1]

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States, involved herein, provides in pertinent part:

> "Congress shall make no law abridging the freedom of speech . . . to petition the government for the redress of grievances."

The Fifth Amendment to the Constitution of the United States, also involved herein, provides in pertinent part:

---

1. See, Transcript of Oral Argument Before the Supreme Court in *Alexander v. Americans United, Inc.*, No. 72-1371 (January 7, 1974), at 22.

". . . nor shall any person . . . be deprived of . . . property, without due process of law . . . ."

The statutory provisions of the Internal Revenue Code (26 U.S.C.) here involved are those of Section 170(a)(1) and (c)(2) of the Code (26 U.S.C. §§170(a)(1) and (c)(2)) which provide in pertinent part:

"§170 Charitable, etc. contributions and gifts

(a) Allowance of deduction.

(1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.

* * *

(c) Charitable contribution defined. — For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of —

* * *

(2) A corporation, trust, or community chest, fund, or foundation

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any state or territory, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

(iv) An organization is an 'action' if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered."

STATEMENT OF THE CASE

This suit arose from the denial of petitioner's claims for income tax refunds. Such claims were based upon petitioner's contention that contributions during the years in issue to the National Association of Railroad Passengers (hereinafter sometimes referred to as "NARP"),[2] an Illinois-not-for-profit consumer membership organization, formed *inter alia* to encourage and promote railroad passenger services, operations and facilities,[3] qualified for tax deductions under Section 170(a) of the 1954 Code (26 U.S.C. §170(a)). Petitioner's position throughout this suit (wherein no material dispute as to the underlying facts is involved) has been, and is, twofold: first, that NARP is an educational organization described in Section 170(a) of the Code (26 U.S.C. §170(c)) and more specifically that "no substantial part" of NARP's activities consisted of "attempting to influence legislation" within the meaning of

2. During 1967 and 1968 petitioner contributed $41,864.23 and $90,000 respectively to NARP. His timely claims for refund for said years were in the amounts of $2,765.95 and $9,840.06, respectively. (His contributions to NARP have totaled more than $400,000 to date.)

3. The corporate purposes of NARP as set forth in its articles and by-laws are as follows:

> "All for the promotion of the common good and general social welfare and the bringing about of civic betterments and social improvements, to act as a focal point for, and either by itself or in conjunction with other associations, groups or individuals to undertake, programs and actions designed to encourage and promote the maintenance and improvement of passenger services, operations and facilities of American railroads, including, without limitation, the promotion of federal and state assistance to railroads for passenger service operations and the encouragement of American railroads to maintain and enhance present passenger services, operations and facilities."

Section 170(c)(2)(D) of the Code (26 U.S.C. §170(c)(2)(D)); and second, that in the event petitioner's contributions to NARP are deemed nondeductible because of the substantiality of its legislative activities, then Section 170 of the Code (26 U.S.C. §170) is unconstitutional under the First and Fifth Amendments.

The Trial Judge of the Court of Claims before whom the suit was tried rejected both of petitioner's contentions and concluded as a matter of law the petitioner was not entitled to recover. As to the application of the statute (and Treasury Regulations promulgated thereunder), the Trial Judge ruled that "[*i*]*nasmuch as* NARP's political[4] activities were more than insubstantial, and such activities were not ancillary to NARP's charitable purposes, *it follows* that NARP did not satisfy the requirement that it be exclusively operated for exempt purposes, as required by the regulation." (Emphasis supplied for reasons set forth *infra*.) As to the constitutional contention, the Trial Judge held that "plaintiff's freedom of speech and right to petition Congress have not been impaired by denial of a tax deduction for his payments to NARP" and that plaintiff's Fifth Amendment argument was without merit because the "Congressional interest in prevention of the use of tax funds to support lobbying is substantial."

Petitioner appealed the Trial Judge's decision to the Court of Claims pursuant to Rule 134(b) of that Court. A three-judge panel of the Court agreed with and adopted the Trial Judge's decision but with a concurring opinion which ruled in effect that

4. No part of NARP's activities were "political" although part were clearly legislative. (Petitioner would say 8.4 and 8.8 percent during the years in issue; the Trial Judge found that 17 and 16.6 percent were legislative.) One can only assume that where the Court below used the term it did so as meaning "legislative."

in the event that substantial legislative activities cause denial of tax deductibility then Section 170(c)(2)(D) creates such discrimination against legislative activity as to raise "constitutional difficulties." Furthermore, the concurring opinion below found these difficulties to be of such a nature "that neither the Trial Judge nor the authorities he cites wholly resolve [them]."

Nevertheless, while thus finding that "constitutional difficulties" were raised, the concurring opinion opined that "cases should be decided if possible without raising *or dealing with* constitutional difficulties and this can be done here by resting the decision on subsection (B) and not going on to subsection (D) on the hypothesis, contrary to fact, that the organization qualifies so far as (B) is concerned." In petitioner's view, this conclusion was based on an incorrect characterization of the Trial Judge's holding, as follows:

> "The trial judge holds that National Association of Railroad Passengers (NARP), the donee of plaintiff's contributions, was disqualified because not operated exclusively for the purposes required by the IRC of 1954, §170(c)(2)(B) *and* (emphasis supplied) a substantial part of its activities involved attempts to influence legislation per §170(c)(2)(D) I deem the former holding clearly correct."

As previously indicated, the Trial Judge actually held that "inasmuch as . . . more than an insubstantial" part of NARP's

activities were legislative "it follows that" it was not operated exclusively for exempt purposes.[5] "Constitutional difficulties" with the statute therefore exist!

REASONS FOR GRANTING THE WRIT

This case presents for review by this Court both the meaning and constitutionality of a tax restriction on legislative activities by charitable and educational organizations. The questions presented are of overwhelming import to all such organizations in the United States and to private philanthropy in the country generally. The decision below should be reviewed, first, because it erroneously interprets and applies an important provision of the Internal Revenue Code seeking to limit the legislative activities of educational organizations to which tax-deductible contributions may be made (which provision has never been considered by this Court), and, second, because it incorrectly concludes that such a significant statutory limitation on legislative activities causing loss of exemption is constitutional. In so concluding, the decision below is in conflict with the underlying principles of tax equality in access to the legislative process as applied by this Court in *Cammarano v. United States*, 358 U.S. 498, 512 (1959). Furthermore, this Court in *Alexander v. Americans United, Inc.*, ____ U.S. ____, 40 L. Ed.2d 315 (1974), indicated its willingness to review these questions provided a party with proper standing appeared. This is such a case. The decision below is contrary to basic First Amendment principles enunciated in *Speiser v. Randall*, 357 U.S. 513 (1958). For all of these reasons this Court should grant this writ. In fact, for any of those reasons, as amplified *infra*, this Court would be justified in granting review.

5. As a reading of the Trial Judge's findings would show, there could be no basis for the conclusion that other nonlegislative activities caused the organization to lose its exemption.

1. In terms of the First Amendment, the 40-year old statutory test for tax deductibility here involved is so vague as to be constitutionally void. No Treasury Regulations, no IRS rulings, no releases, bulletins, revenue procedures, and no cases exist which explain what is meant by "no substantial part." No satisfactory definition of "influencing legislation" exists. The two-fold test involving both a "no substantial part" determination and an "influencing legislation" determination raises such questions of meaning and interpretation as to have a demonstrable chilling effect on both educational (and charitable) organizations and their contributors. No adequate guidance as to the meaning of the statutory restriction exists although the statute has been in existence in its present form since 1934. (While the meaning of "influencing legislation" is interpreted by Treasury Regulations, those regulations as interpreted below deny deductibility to any organization not fully presenting all sides of an issue even though the other sides are fully expressed by others.) In this case, NARP expended, according to the Court below, 17 and 16.6 percent of its funds on legislative efforts of all types (petitioner would say 8.4 and 8.8 percent)[6] and has been denied tax deductibility. Can an organization expending 15, or 10 percent feel confident of tax deductible status? Can its contributors? The Treasury Department has had over forty years since enactment of the statutory test here involved to promulgate meaningful regulations and it has not done so. The test by itself is constitutionally void.

---

6. The difference between the petitioner and the Court below on the calculation of these expenditure percentages arises from the fact that the Court of Claims' trial judge, petitioner contends erroneously, failed to allocate any part of payments to a Washington, D.C. public relations firm to the educational nonlegislative activities which it carried on.

2. Petitioner contends that no substantial part of NARP's activities during the years involved (1967 and 1968 considered individually) was restricted by the statute. This contention is two-fold: First, petitioner argues that "no substantial part" of NARP's activities were legislative. This argument is principally based on the expenditure percentages as found by the Trial Judge to constitute substantiality, even though petitioner (for reasons set forth in footnote 7) thinks those percentages to be overstated. Second, petitioner contends that the legislative activities of NARP were not "carrying on propaganda, or otherwise attempting, to influence legislation," since within the clear meaning of the Treasury Regulations interpreting that phrase, NARP's activities constituted "nonpartisan analysis, study, or research" which Section 170(c)(2) does not proscribe or limit. See, Treas. Regs. §1.501(c)(3)-1(c)(3)(iv) and §53.4945-2(d)(1)(ii). There can be no more important question of federal law than to determine the extent to which an otherwise tax-exempt, tax-deductible organization may advocate a particular position of a nonpolitical nature before the Congress. The Treasury Regulations state that an organization such as NARP may by nonpartisan analysis, study, or research "advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or judgment."[7] However, after rejecting the plain dictionary definition of

7. Treas. Reg. §53.4945-2(d)(1)(ii) an excise tax regulation interpreting the same language found in the statutory provision enacted as part of the private foundation reform in the Revenue Act of 1969 which provision the parties and the Court below agree sets forth a relevant interpretation of the regulatory language interpreting §170(c)(2)(D) and its corresponding exemption provision §501(c)(3) of the Code.

"nonpartisan"[8] without support in the legislative history, or elsewhere, or citation of authority, the Court below held nonpartisan meant the advocacy of even a nonpolitical position where the weight of the information presented is clearly on only one side of a legislative controversy. Advocacy of a nonpolitical position has therefore been rejected even though it was apparent either that the other side of the issue of adequate rail passenger service was either quite adequately presented, e.g., (by the very railroads' intent on discontinuing the service) or that it was, in some instances, not even capable of presentation. The Court below would thus leave the crucial determination of what is nonpartisan to the administrative ruling of the taxing authority in the great majority of cases. This most unsatisfactory result cannot be left to stand since it would leave to the tax collector the final decision in almost all cases as to what legislative activities are to be permitted. It is therefore of utmost importance both to the interests of private philanthropy and to the charitable, educational, and consumer organizations affected that this statutory provision receive the interpretation of this Court. Because "the overwhelming power of the Internal Revenue Service" may, in this regard, "endanger philanthropy and its resultant public benefits," for this reason alone this petition should be granted. See, dissenting opinion by Mr. Justice Blackmun in *Alexander v. Americans United, Inc., supra.*

---

8. This dictionary definition of "nonpartisan" is as follows:

> "*non-partisan:* adj. not partisan: as *a:* not affiliated with or committed to the support of a particular political party: politically independent; *b:* viewing matters or policies without party bias: OBJECTIVE, IMPARTIAL: *c:* held or organized with all party emblems or designations absent from the ballot; *d:* composed, appointed, or elected without regard to the political party applications of members. . . ." *Webster's Third New International Dictionary,* (1966), at 1538.

3. The opinion of the Court of Claims having rejected petitioner's claim under the statute — principally because of an incorrect application of the word "nonpartisan" in the regulations to this organization — dealt at length with petitioner's First Amendment argument(s) and with this Court's opinions in *Speiser v. Randall, supra,* and *Cammarano v. United States, supra,* in part, as follows:

> "Plaintiff relies upon *Speiser,* which struck down as violative of procedural due process a California statute that acquired a loyalty oath as a condition of a property tax exemption. Subsequently, the Supreme Court distinguished *Speiser* in *Cammarano v. United States,* a case which is more apposite to the NARP relations. In *Cammarano,* the Supreme Court upheld regulations promulgated under the Internal Revenue Code of 1939 that excluded from deductions for 'ordinary and necessary' business expenses sums that were expended 'for the promotion or defeat of legislation.' The Supreme Court upheld the regulation as expressive of the 'sharply defined policy' of Congress that applied to the tax status of organizations that were otherwise qualified for exemption but which engaged in activities designed to promote or defeat legislation."

Petitioner agrees with this discussion of *Cammarano* provided that it is kept in mind that only the deductibility of the organization's legislative expenditures was involved in *Cammarano,* not the denial of deductibility to expenditures which are not legislative in nature, as here.

The Trial Judge in his opinion adopted by the Court below then quoted at length from the *Cammarano* opinion for the purpose of demonstrating that *Speiser* was both "not relevant" and distinguishable insofar as the First Amendment contention of petitioner here is concerned. Here again, the quotations from *Cammarano* selected by the Court below, however, support rather than defeat petitioner's argument. The petitioner here (not so the petitioners in *Cammarano*) is "being denied a tax deduction because [he] engage[s] in constitutionally protected activities," unlike others "engaging in similar activities are required to do under the provision of the Internal Revenue Code." Petitioner here argues for, not against, the nondiscriminatory application of the deduction provisions of the Code as they pertain to legislative activities so that "everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned." (358 U.S. at 513.)

The Court below, by its quotation from the concurring opinion in *Cammarano* is even more supportive of petitioner's contention, for it demonstrates that the key factor in *Speiser* which this Court found distinguishable in (and missing from) *Cammarano* was that Congress had not "gone so far as to deny all deductions . . . if a taxpayer spent money" on legislation. Congress has gone that far here! If petitioner's entire deductions for his contributions to NARP are denied then it can be said that Congress in fact "*has* undertaken to penalize taxpayers for certain types of advocacy," i.e., before the legislature, just as the State of California did in *Speiser*. In brief, petitioner argues for, not against, a completely "hands-off policy on the part of the government" which is the underlying premise of the First Amendment.

As the United States Tax Court stated in the case of *Golden Rule Church Assn.*, 41 T.C. 719 (1964), at 729, "although tax benefits such as exemption may be matters of legislative grace . . . nevertheless a denial of such benefits granted to others

of essentially the same class may well give rise to the level of an unconstitutional discrimination." Petitioner points to the statutory scheme itself applicable to tax exemption whereby such organizations such as labor unions and veterans groups can lobby without limitation as examples of such discrimination. Compare Sections 501(c)(3), (5), and (19) of the Internal Revenue Code. The Court below ignored this contention.

4. If this were not enough, the Court below, in rejecting petitioner's equal protection contention, chose to disregard the fact that Congress by enacting Section 162(e)[9] of the Code in

9. (c) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION —

(1) IN GENERAL. — The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business —

(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

(2) LIMITATION. — The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) —

(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

1962 has expressedly in fact (because of this Court's decision in *Cammarano)* "undertaken to penalize certain taxpayers" and thereby violated the "hands-off policy" underlying the First Amendment. As a consequence petitioner's Fifth Amendment rights to equal protection of the laws have also been violated by disallowing his contributions to this consumer organization tax deductibility. By thus legislating in this important area the denial of petitioner's deduction stands in contrast to the deduction to which railroads operating passenger trains are entitled. The Court below has contravened the very equal protection standard it states so clearly:

> "Where the [legislative] classification touches a fundamental right, however, such as interstate movement or first amendment rights, a stricter standard applies, and the classification is judged on the basis of whether it promotes a *compelling* state interest." (Emphasis, the Court's, citing *Shapiro v. Thompson,* 394 U.S. 618 (1969), at 638.)

In view of the enactment of Section 162(e) by the Congress in 1962, it cannot now be said (as the Court below did) that "Congressional interest in prevention of the use of tax funds to support lobbying is compelling." In the light of the enactment of §162(e) (and its legislative history)[10] one cannot now conclude as

---

10. The legislative history of Section 162(e) makes it clear that no compelling governmental interest exists to support the intentional discrimination in the statutory limitation on legislative activities of educational organizations such as NARP. See S. Rept. No. 1881, 87 Cong. 2nd Sess. (1962), at 22, where the reason for that provision is set forth, and where the Senate Finance Committee states:

> "*It is also desirable* that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses *not be discouraged* in making this information available to the members of Congress or legislators at other levels of government. The presentation of such information to the legislators *is necessary* to a proper evaluation on their part of the impact of present or proposed legislation."

the Court below did, that legislative activities are recognized by the Congress to constitute "damages to representative government [sic] procedures."

5. Even the Treasury Department is on record as recognizing the need for a change in its interpretation of the statute to permit the presentation of a tax exempt organization's views to the Congress and its committees. The Assistant Secretary of the Treasury for Tax Policy in 1972 stated before a Congressional Committee, as follows:

> "As to the phrase 'carrying on propaganda, or otherwise attempting to influence legislation,' we have interpreted it so as to permit research and study of matters that may be the subject of legislation, and the publication of those studies. We have also interpreted it as permitting attempts to influence administrative decisions as to the application of legislation, and to influence the exercise by administrative officials of discretion given them by legislation. We have interpreted it to permit litigation in the courts to construe legislation that has been enacted or to construe the provisions of constitutions. Thus far we have not interpreted it to permit attempts to persuade legislative bodies as to the enactment of legislation, and especially not to permit so-called grassroots lobbying to bring influence to bear upon members of legislative bodies to affect their vote. We have given extensive consideration to the possibility of modifying the existing

> regulations to construe the present statutory language to permit the presentation of views concerning legislation in public hearings of the Congress and other legislative bodies. We have, however, interpreted the language to permit the organizations to make available the results of their research and study to committees of legislative bodies when requested by those Committees." Statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy before the House, Ways and Means Committee.

Unfortunately, the Treasury has not seen fit to so interpret the statute to preserve its constitutionality.

6. Interestingly enough, one need only read the pertinent paragraphs of the opinion adopted by the Court below to see that no compelling state or governmental interest can be found which would justify the statutory classification here involved. First, the Court below in effect found that a larger organization was constitutionally permitted to carry on more extensive legislative efforts than smaller ones, as follows:

> "The classification described in plaintiff's first theory — all individuals who contribute and all organizations that receive charitable contributions — is too broad. Organizations to which payments are made may be divided into at least two classes on the basis of purpose and scope of operations. A small organization that

> devotes a substantial part of its energies and resources to attempts to influence legislation has a different purpose than a large organization that utilizes only an insubstantial and relatively small part of its total resources for such legislative activities."

Second, the Court below in effect found that adversaries in the legislative arena may be treated differently insofar as the subsidization of the taxing statute is concerned, as follows:

> "With respect to the classification in plaintiff's second theory — a class of charitable organizations and a class of business organizations — such division has been long recognized and is reasonable. Congress has recognized the propriety of a deduction as an ordinary and necessary expense for business with respect to legislation or proposed legislation that directly affects the ability of business to produce income and to pay taxes thereon. The deduction is related to the profit-motivated activities of the taxpayer. Activities of charitable organizations stem from different motivations, and contributions to such organizations are matters of personal concern. Absence of a standard generally applicable justifies differentiation in a separate class."

This statutory classification, which would deny deductibility to contributions to a small consumer-oriented educational organization such as NARP advocating the improvement of rail

passenger service in the United States (and expending, under the most unfavorable interpretation of the facts, slightly more than 15 percent of its funds on the totality of its governmental representation) but which permits a tax deduction for contributions to much larger organizations with considerably greater legislative efforts and which permits railroads in some cases opposing the efforts of NARP to deduct all their lobbying expenditures, raises Fifth Amendment equal protection issue of such magnitude as to constitute reason enough for granting this petition.[11] For a comprehensive discussion of the constitutionality of Sections 170(c) and 501(c)(3) see Troyer, *Charities, Law-Making and the Constitution; The Validity of the Restrictions on Influencing Legislation,* 31 N.Y.U. Tax. Institute 1415 (1973) wherein a lengthy laundry list of constitutional questions posed by the statutory provisions has been extensively enumerated and explored. In addition to the discriminations described above, the cited article points to the even more obvious statutory inequities under the tax exemption provisions which permit labor organizations and veterans' groups to lobby without any limitations whatsoever. In summary, as the concurring opinion of the Court below found, the statutory language poses "constitutional difficulties" which have not been dispelled.

7. While this Court declined to accord standing to the plaintiff organization in *Alexander v. Americans United, Inc., supra,* it expressed neither its approval nor disapproval of the District of Columbia Circuit's holding that these same contentions therein raised substantial constitutional questions.

---

11. Assistant Secretary of the Treasury Edwin S. Cohen made a similar point in testimony before the House, Ways and Means Committee on May 3, 1972. *Hearings-Legislative Activity by Certain Types of Exempt Organizations,* pp. 6-9.

That holding by the Court of Appeals is therefore generally supportive of petitioner's petition in this case. (As stated, *supra*, the standing problem found to exist there does not exist here.) Furthermore, petitioner, as indicated previously, because of the position stated by the Assistant Attorney General in his oral argument before this Court in *Americans United*, has reason to believe that the Internal Revenue Service would "welcome" the review of this case.[12]

This case, perhaps uniquely, presents the denial of First and Fifth Amendment rights against the background of one of the most vital national issues facing us: adequate mass transportation service with all its benefits to the environment energy efficiency, and economy. If the unfettered freedoms of speech and petition are denied in this case then the Internal Revenue Service becomes the arbiter of permissible legislative efforts by tax exempt organizations under a statute which is inherently vague and unfair.

---

12. Scott P. Crampton, Assistant Attorney General, Department of Justice, arguing on behalf of the Commissioner of Internal Revenue on January 7, 1974 before this Court stated as follows:

> "But I believe the Service would welcome a chance to test this on the merits, and certainly, in so far as those of us who are presently in the Department of Justice are concerned, we think this is the way to meet the situation, and I have told a number of tax-exempt organizations that as far as I personally was concerned, we'll meet them in court any time on this fact question and get it decided."

CONCLUSION

For any and all of the reasons stated, *supra*, because there is here presented *both* an important question of federal law which has not been settled by this Court *and* a question in which the Court of Claims has decided a federal question in a way in conflict with the Constitution and with applicable decisions of this Court, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Charles W. Schoeneman

SCHOENEMAN & RALSTON
Attorneys for Petitioner
11800 Sunrise Valley Drive
Reston, Virginia 22091

APPENDIX A — OPINION OF UNITED STATES COURT OF CLAIMS

In the United States Court of Claims

No. 818-71

(Decided July 19, 1974)

ANTHONY HASWELL v. THE UNITED STATES

Charles W. Schoeneman, attorney of record, for plaintiff. *Allan C. Lewis*, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews* and *Joseph Kovner*, of counsel.

Before NICHOLS, KASHIWA, and BENNETT, *Judges*.

OPINION

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision filed on October 10, 1973, by Trial Judge Kenneth R. Harkins pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the decision, as hereinafter set forth,* it hereby adopts the same as the basis for its judgment in this case.** Therefore, plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

HARKINS, *Trial Judge:* Plaintiff seeks a refund of income taxes paid in 1967 and 1968 on the theory that his payments

---

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed October 10, 1973, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

**The concurring opinion of NICHOLS, *Judge*, follows the opinion of the trial judge which has been adopted by the court.

to the National Association of Railroad Passengers (NARP) were charitable contributions as then defined in Section 170(c)(2) of the Internal Revenue Code of 1954.[1] In 1967 and 1968, plaintiff timely paid income taxes of $7,783.67 and $23,059.96, respectively, but did not claim a deduction for payments to NARP, which had totaled $41,864.23 in 1967 and $90,000 in 1968. On April 13, 1971, a refund of $2,765.95 was claimed for 1967 and $9,840.06 for 1968. These refund claims were disallowed on December 17, 1971.

To be deductible, a charitable contribution must satisfy section 170(c)(2), which, among other requirements, specifies that the payment be made to an organization "organized and operated exclusively" for certain purposes, and "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."[2] Plaintiff contends that no substantial part of NARP's activities during 1967 and 1968 was the proscribed carrying on of propaganda or otherwise attempting to influence legislation and that NARP's legislative program is properly characterized as the making available of the results of nonpartisan analysis, study, or research which section 170(c)(2) does not proscribe.

In the event section 170(c)(2) is construed, or its application is interpreted, to prevent a deduction because of NARP's legislative efforts, plaintiff contends such application would violate plaintiff's first amendment rights to freedom of speech

---

[1] 26 U.S.C. § 170(c)(2) (1970).

[2] Section 170(c)(2) provides:

"(c) Charitable contribution defined.—For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—

• • • • •

"(2) A corporation, trust, or community chest, fund, or foundation—

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

"A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B)."

and peaceably to petition the legislature for redress of grievances. Further, such application of section 170(c)(2) would infringe plaintiff's rights to equal protection under the due process clause of the fifth amendment.

As will be shown, in 1967 and 1968, NARP was not operated exclusively for the purposes required by section 170(c)(2)(B) and a substantial part of its activities involved attempts to influence legislation within the limitation of section 170(c)(2)(D). Disallowance of plaintiff's payments to NARP in 1967 and 1968 as charitable contributions under Section 170 of the Internal Revenue Code of 1954 does not violate plaintiff's rights under the first or fifth amendment to the Constitution.

I

Summary of Facts

In 1967, plaintiff's concern over discontinuances of passenger trains in the United States caused him to undertake a program to preserve, improve, and expand railroad passenger service. As part of this program, plaintiff caused NARP to be incorporated on May 18, 1967, under the "General Not For Profit Corporation Act" of Illinois. The purposes for which NARP was organized were to act as a focal point for, and to undertake, programs designed to encourage and promote maintenance and improvement of passenger services, operations, and facilities of American railroads.[3]

Although it was incorporated as a membership corporation and, by December 31, 1968, NARP had approximately 3,000 members, the major source of its income was plaintiff's personal funds. In 1967, plaintiff's payments to NARP were equal to 83.2 percent of its total expenditures, and in 1968 were equal to 86.7 percent. After NARP was formed, plaintiff devoted full time to its affairs. Plaintiff has been NARP's

[3] NARP's Articles of Incorporation and its By-Laws stated the purposes: "All for the promotion of the common good and general social welfare and the bringing about of civic betterments and social improvements, to act as a focal point for, and either by itself or in conjunction with other associations, groups or individuals to undertake, programs and actions designed to encourage and promote the maintenance and improvement of passenger services, operations and facilities of American railroads, including, without limitation, the promotion of federal and state assistance to railroads for passenger service operations and the encouragement of American railroads to maintain and enhance present passenger services, operations and facilities."

only chairman and, in 1967 and 1968, was its executive director. Plaintiff received no salary and was reimbursed for NARP's entertainment and travel expenses only. NARP's staff during 1967 and 1968, in addition to plaintiff, was a full-time secretary and a clerical helper.[4]

Plaintiff's ideas as to the best way to assert the interests of the users and consumers of rail passenger transportation were implemented through NARP. The conditions sought to be achieved through NARP were (1) adequate legal controls over train discontinuances; (2) fair and equal governmental treatment of the rail passenger; and (3) a national transportation policy in which rail passenger service was an essential element. In 1967 and 1968, NARP's program involved educational activities, litigation before the Interstate Commerce Commission or other regulatory agencies to oppose specific proposals for discontinuances of passenger train service, and attempts to influence legislation.

NARP's educational and informational activities to inform the public on problems that affected rail passenger consumers, in 1967 and 1968, included publication of a report, a brochure, a survey of passenger train operations, information made available in NARP's press releases, and speeches made by plaintiff to such organizations as the Passenger Club of Chicago and the Washington Chapter of the Transportation Research Forum.

NARP's litigation activities were limited in 1967, but were expanded substantially in 1968. In 1967, NARP sent two or three letters to the Interstate Commerce Commission to protest discontinuances of passenger trains. In 1968, NARP retained counsel for representation in seven discontinuance proceedings at the ICC, as well as in the ICC "adequacies" case, an investigation to determine whether the ICC had jurisdiction to regulate the adequacy of passenger train service. In addition, in 1968, NARP retained counsel for a case before the Ohio Public Utilities Commission relative to the Penn Central's curtailment of passenger service in Ohio. As

---

[4] NARP has a letter from the Internal Revenue Service holding it to be an exempt organization under Section 501(c)(4) of the Internal Revenue Code of 1954. NARP did not apply to the Internal Revenue Service for classification, in 1967 and 1968, as a section 501(c)(3) organization on advice of counsel at that time because NARP planned to get involved to some extent in legislation and in litigation.

part of its litigation effort, NARP also secured, as needed, services of a cost expert and a marketing consultant.

From the start of his program, plaintiff recognized that attainment of the goal to preserve, improve, and expand railroad passenger service would require political action at the national level. On May 9, 1967, prior to the incorporation of NARP, plaintiff explored his proposed program with a senior partner of National Counsel Associates (NCA), a Washington consulting firm that specialized in lobbying. In his correspondence with NCA, plaintiff indicated that he expected NCA to represent NARP in legislative matters before Congress and to promote its interests within the executive departments. Plaintiff emphasized that NARP's objectives "will require substantial legislative action by the Congress." NARP's contract with NCA was signed on June 5, 1967, 18 days after NARP was incorporated.

In 1967 and 1968, NARP's legislative activities involved participation in proceedings in both Houses of the United States Congress in connection with legislation proposed by the Interstate Commerce Commission to amend Section 13(a) of the Interstate Commerce Act. As executive director of NARP, plaintiff testified four times before subcommittees of the Senate Committee on Commerce or of the Senate Committee on Banking and Currency. In addition to these appearances as executive director of NARP, plaintiff submitted four written statements or letters to the House of Representatives' Interstate and Foreign Commerce Committee or its subcommittees.

Each appearance as a witness or written submission by plaintiff on behalf of NARP was an activity that involved an attempt to influence pending legislation or to secure legislation sought by NARP. Each appearance as a witness or submission of written materials by plaintiff on behalf of NARP was in response to an invitation from the committee that had been arranged by NCA, NARP's Washington representative. In each instance that plaintiff testified, or submitted written materials, the testimony or materials stated NARP's position on behalf of the consumer rail passenger. No part of plaintiff's testimony before, or submissions to, legislative committees in 1967 and 1968 was partisan from the standpoint of identification with any particular political party. NARP has never participated in, or contributed to, a political campaign, and materials produced by NARP were not partisan from the

standpoint of identification with any particular political party.

In its attempts to influence legislation, NARP advocated the interest of the consumer railroad passengers of the United States. Testimony by plaintiff and the written materials submitted did not represent nonpartisan analysis, study, or research in that the testimony or the materials were not the type of full and fair objective expositions that would enable the public to reach an independent conclusion on the subject. Plaintiff's testimony on behalf of NARP and the written materials submitted advocated a particular position and were partisan on the issue of the necessity to continue rail passenger service. In view of the complexities of rail industry operations and of its regulation, much of NARP's testimony and written materials necessarily included technical advice and assistance.[5]

---

[5] Regulations promulgated under Sections 4945 (d) and (e) of the Tax Reform Act of 1969 applicable to excise taxes and taxable expenditures of private foundations define "nonpartisan analysis, study or research" and "technical advice or assistance."

Treas. Reg. § 53.4945-2(d)(1)(ii) provides:

"(ii) *Nonpartisan analysis, study or research.* For purposes of section 4945(e), 'nonpartisan analysis, study, or research' means an independent and objective exposition of a particular subject matter, including any activity which is 'educational' within the meaning of § 1.501(c)(3)-1(d)(3) of this chapter. Thus, 'nonpartisan analysis, study, or research' may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. On the other hand, the mere presentation of unsupported opinion does not qualify as 'nonpartisan analysis, study, or research.' Activities of a noncommercial educational broadcasting station or network (television or radio) constitute 'nonpartisan analysis, study, or research' if the station or network adheres to the Federal Communications Commission regulations and its 'fairness doctrine' (requiring balanced, fair, and objective presentation of issues). Ordinarily, if no determination has been made by the Federal Communications Commission that the 'fairness doctrine' (as stated above) has been violated, the activities of the station or network will be treated as 'nonpartisan analysis, study, or research.'"

Technical advice or assistance results from knowledge or skill in a given area. Treas. Reg. § 53.4945-2(d)(2)(ii) provides:

"(ii) *Nature of technical advice or assistance.* 'Technical advice or assistance' may be given as a result of knowledge or skill in a given area. Because such assistance or advice may be given only at the express request of a governmental body, committee or subdivision, the oral or written presentation of such assistance or advice need not qualify as nonpartisan analysis, study or research. The offering of opinions or recommendations will ordinarily qualify under this exception only if such opinions or recommendations are specifically requested by the governmental body, committee or subdivision or are directly related to the materials so requested."

NARP's legislative activities were not limited to direct testimony or written submissions to congressional committees. Through NCA or through plaintiff as executive director, NARP made presentations of its views on pending legislation by personal contacts with Members of Congress, their legislative or administrative assistants, or with staff members of congressional committees. These personal presentations were made in informal meetings in legislative offices, at lunch, or over cocktails.

During 1967 and 1968, NCA was host for NARP at two or three cocktail parties to give plaintiff an opportunity to meet with Members of Congress and selected members of the staffs of Members of Congress or of congressional committees. At these cocktail parties, plaintiff and NCA talked about rail passenger problems and NARP's legislative goals for adequate passenger train service. In addition, in 1967 and 1968, NCA entertained at cocktails or lunch, for the purpose of presenting NARP's views on pending legislation, five Members of Congress, 16 legislative or administrative assistants to Members of Congress, and six professional or technical staff members of congressional committees. Plaintiff had personal interviews with approximately five to 10 Members of Congress, most of whom were members of committees or subcommittees which had legislation pending that could affect the rail passenger. In 1967, plaintiff conferred with approximately 12 to 15 congressional staff personnel on pending legislation that could affect the rail passenger and, in 1968, with approximately 30 such staff personnel.

In addition to direct attempts to influence legislation by presentations to congressional committees, Members of Congress, or congressional staff personnel, NCA undertook indirect legislative activities on behalf of NARP that included meetings with personnel of the Department of Transportation and the Interstate Commerce Commission who were concerned with railroad legislation. In these meetings, NCA sought to establish NARP as a legitimate spokesman for railroad passengers.

Background Analysis

Federal revenue laws historically have exempted from taxation organizations created and operated exclusively for

religious, charitable, scientific, literary, or educational purposes. In the Internal Revenue Code of 1954, such organizations are included in section 501(c)(3) in the enumeration of entities exempted from federal income taxation.[6] If an organization can qualify for exemption under section 501(c)(3), it acquires not only a tax exempt status, but also the status of an organization to which deductible contributions can be made.[7]

The exemption is given to section 501(c)(3) organizations because of the benefit the public is assumed to derive from their charitable, religious, educational, or similar operations. The exemption, and the corresponding deduction, recognize the benefits resulting from promotion of the general welfare and are based on the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds.[8]

Prior to the Revenue Act of 1934, the revenue laws did not impose specific limitations on the political activities of tax exempt organizations. Treasury Department regulations, however, since 1919 had denied an exemption to organizations that disseminated controversial or partisan propaganda on the ground that such action was not within the exempt purposes. The Revenue Act of 1934, in sections 101(6) (exempt organizations) and 23(o)(2) (charitable deductions), added a substantiality test to the exemption for organizations

---

[6] Section 501(c)(3) reads:

"(c) List of exempt organizations.— • • •

• • • • •

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

[7] Int. Rev. Code of 1954, § 170(c)(2) (income tax); § 2055(a)(2) (estate tax); and § 2522(a)(2) (gift tax).

[8] H.R. REP. No. 1860, 75th Cong., 3d Sess. 19 (1939); *see generally* Geske, *Direct Lobbying Activities of Public Charities*, 26 TAX LAWYER 305 (1973); Walker & Rothermel, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114 (1969–70); *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, 470 F. 2d 849, 853–54 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

"organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." These sections granted the exemption or permitted the deduction of contributions to qualified organizations provided that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

The case which led to the 1934 legislation was *Slee* v. *Commissioner*.[9] In that case, the court held that the American Birth Control League was not entitled to a charitable exemption because it disseminated propaganda to legislators and to the public aimed at the repeal of laws preventing birth control. A tax exempt status was denied because the League's purpose was not exclusively charitable, educational, or scientific. In 1954, exempt status was further limited in section 501(c)(3) by a condition against participation or intervention in political campaigns on behalf of candidates for public office.

Tax exemptions are matters of legislative grace and taxpayers have the burden of establishing their entitlement to exemptions. The limitations in sections 501(c)(3) and 170(c)(2) of the 1954 Code stem from the policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation should not be subsidized.[10] The Supreme Court in 1958 traced the development of the congressional policy against an exemption for organizations that attempt to promote or defeat legislation and stated:[11]

> * * * These limitations, carried over into the 1939 and 1954 Codes [footnote omitted], made explicit the conclusion derived by Judge Learned Hand in 1930 that "political agitation as such is outside the statute, however innocent the aim * * *. Controversies of that sort must be conducted without public subvention: the Treasury stands aside from them." * * *

Until 1962, the revenue laws basically accorded the same treatment to business interests and nonbusiness interests with respect to political activities. Treasury regulations applicable

---

[9] 42 F. 2d 184 (2d Cir. 1930).

[10] *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, *supra* note 8, 470 F. 2d at 854.

[11] *Cammarano* v. *United States*, 358 U.S. 498, 512 (1959).

to trade or business expenses consistently had not allowed a deduction for expenses incurred in lobbying, and these regulations were interpreted by the Supreme Court to preclude deductions for expenditures made in connection with efforts to promote or defeat legislation by persuasion of the general public as well as efforts to influence legislative bodies through lobbying.[12]

In 1962, the provisions applicable to deductions for trade or business expenses were amended by adding a new subsection (e) to section 162 of the 1954 Code. The new subsection altered the neutrality between business and nonbusiness interests in that it allowed deductions for amounts paid "in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or the individual members, of Congress * * * with respect to legislation or proposed legislation of direct interest to the taxpayer." [13] The new subsection (e) also allowed deductions for amounts paid in direct connection with communication of information to a trade association or other organization with respect to legislation of mutually direct interest. Deductions were barred for any amount paid in connection with political campaigns on behalf of any candidate for public office or in connection with any attempt to influence the general public with respect to legislative matters.

Justification for the disparity in treatment for business interests by the 1962 amendment was found in the relationship to profit-motivated activities: (1) Since expenses for direct lobbying related to income-producing activities, an accurate measure of net income required that they be deductible; (2) expenses incurred in appearing before executive or administrative officials with respect to administrative matters, and before the courts with respect to judicial matters, were allowable, and the expenses of appearing before legislative bodies were similar from a business standpoint; and (3) as a matter of governmental policy, it was desirable for legislative bodies to have readily available information on the impact of proposed legislation on the trade or business of affected taxpayers.

Since the 1962 amendment, similar considerations have

[12] *Id.*, at 504–05.
[13] 26 U.S.C. § 162(e) (1970).

been advanced to justify legislative efforts by charities on matters that concern their program or status. To this end, amendments have been offered to modify the restrictions of section 501(c)(3) on direct lobbying by charities. Thus far, such efforts have been unsuccessful. Congress, in enacting the Tax Reform Act of 1969, in the only provision concerning political activities of charities, added further restrictions on such activities by private foundations. The new section 4945, added to the 1954 Code by section 101(b) of the Tax Reform Act of 1969, imposes excise taxes on amounts paid by private foundations for direct and grassroot lobbying activities even where such activities are insubstantial. The new section 4945, however, and the regulations promulgated thereunder, provide additional and more precise definition of activities that are included within the limitation "to carry on propaganda, or otherwise to attempt, to influence legislation." [14]

Neither the legislative histories of sections 170(c)(2) and 501(c)(3), nor the cases that have arisen thereunder, provide specific guidance as to the content of the phrases "organized and operated exclusively," "no substantial part," and "to influence legislation," as used in those sections.

Treasury regulations under section 170(c)(2) follow the statutory language and provide that, for purposes of deter-

---

[14] 26 U.S.C. §§ 4945 (d) and (e) (1970) provide in part:

"(d) Taxable expenditure.

"For purposes of this section, the term 'taxable expenditure' means any amount paid or incurred by a private foundation—

"(1) to carry on propaganda, or otherwise to attempt, to influence legislation, within the meaning of subsection (e),

• • • • •

"(e) Activities within subsection (d)(1).

"For purposes of section (d)(1), the term 'taxable expenditure' means any amount paid or incurred by a private foundation for—

"(1) any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof, and

"(2) any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be),

"other than through making available the results of nonpartisan analysis, study, or research. Paragraph (2) of this subsection shall not apply to any amount paid or incurred in connection with an appearance before, or communication to, any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation."

mining whether an organization is attempting to influence legislation or is engaging in political activities, reference should be made to the regulations promulgated under section 501(c)(3).[15] The cases provide guidelines as to the extent and types of activities that disqualify the exemption and the deduction.

An organization that engages in substantial activity aimed at influencing legislation is disqualified from a tax exemption, whatever the motivation.[16] The applicability of the influencing legislation clause is not affected by the selfish and unselfish motives and interests of the organization, and it applies to all organizations whether they represent private interests or the interests of the public.[17] The term "exclusively" is given a connotation that differs from the ordinary meaning of the term, and activities which are minor, and not substantial, do not disqualify charitable and educational organizations from the benefit of the exemption nor do they disqualify individual contributors to such organizations from a deduction. The limitation is remedial and should be liberally construed.[18]

The political efforts of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities is to influence, or is an attempt to influence, legislation. A percentage test to determine whether the activities are substantial is not appropriate. Such a test obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the organization.[19]

Although parity of treatment among taxpayers with respect to political activities was altered in 1962 for business interests, and in 1969 for private foundations, the revenue laws have not been changed in relation to the political

---

[15] 26 C.F.R. § 1.170-1(f) (1968).

[16] *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, *supra* note 8, 470 F. 2d at 854.

[17] *League of Women Voters* v. *United States*, 148 Ct. Cl. 561, 180 F. Supp. 379, *cert. denied*, 364 U.S. 822 (1960).

[18] *Sensongood* v. *Commissioner*, 227 F. 2d 907, 910 (6th Cir. 1955), and cases there cited.

[19] *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, *supra* note 8, 470 F. 2d at 855; *Dulles* v. *Johnson*, 273 F. 2d 362, 367 (2d Cir. 1959), *cert. denied*, 364 U.S. 834 (1960).

activities of charitable and educational organizations that are subject to sections 501(c)(3) and 170(c)(2). Until new legislation is enacted, these organizations continue with the same limitations on their exemptions, and on the deductibility of contributions to them, that were established in the Internal Revenue Code of 1954, and the guidelines that have been established apply to NARP's operations in 1967 and 1968. Whether NARP was operated exclusively for charitable and educational purposes and whether a substantial part of its operations involved attempts to influence legislation are questions of fact to be determined through a comparison of its purely charitable activities to its activities to influence legislation.[20]

Disposition of Claim

NARP's operations may be divided into four categories: administrative; educational; litigation; and legislative. The question then becomes whether the activities concerned with legislation are the type that are proscribed by sections 170(c)(2) and 501(c)(3) or whether those activities are the type of nonpartisan analysis, study, or research or of technical advice or assistance, that remove them from the limitation. For convenient reference, the terms "legislative activities" and "political activities" will be used hereinafter to identify action that is "carrying on propaganda, or otherwise attempting, to influence legislation," within the meaning of section 170(c)(2)(D).

Treasury regulations in effect in 1967 and 1968 under section 501(c)(3) excluded "nonpartisan analysis, study, or research and making the results thereof available to the public" from the definition of advocacy that was one of the two characteristics of an "action" organization. An "action" organization, by definition, was not operated exclusively for an exempt purpose and, accordingly, was not eligible as an exempt organization.[21] The section 501(c)(3) regulations, however, did not define what constitutes "nonpartisan analysis, study, or research" nor did these regulations state that the results of nonpartisan analysis, study, or research may be made available to legislative bodies when legislation is pending.

[20] *Davis* v. *Commissioner*, 22 T.C. 1091, 1099 (1954).
[21] 26 C.F.R. § 1-501(c)(3)-1(c)(3)(iv)(b) (1968).

The Tax Reform Act of 1969 provides more precision. Section 4945(d) includes in the definition of a taxable expenditure of a private foundation amounts paid to carry on propaganda, or otherwise to attempt, to influence legislation "within the meaning of subsection (e)." In subsection (e), the "making available the results of nonpartisan analysis, study, or research" in communications with any member or employee of a legislative body or any other Government official or employee who may participate in the formulation of legislation is permissible and is not considered to be a proscribed attempt to influence legislation. No penalty attaches to a private foundation for making available the results of nonpartisan analysis, study, or research. By analogy, similar language in the section 501(c)(3) regulation in effect in 1967 and 1968 should permit charitable and educational organizations to undertake similar activity and not lose their exemption.

The Treasury regulations add further definition to what constitutes "nonpartisan analysis, study, or research." For the purposes of subsection 4945(e), "nonpartisan analysis, study, or research" means an *independent* and *objective* exposition of a particular subject matter. The term includes any activity which would be "educational," as defined in the regulations under section 501(c)(3).[22] Advocacy of a particular position or viewpoint qualifies as nonpartisan analysis, study, or research as long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. Presentation of unsupported opinion does not qualify. The examples in the regulation make it clear that projects designed to present information merely of one side of a legislative controversy do not qualify as nonpartisan, nor do projects that fail to report available information that would tend to dispute conclusions that are advocated.

"Nonpartisan," as used in the statute and regulations, need not refer to organized political parties. Nonpartisan analysis,

---

[22] 26 C.F.R. § 53.4945-2(d)(1)(iii), *supra* note 5. 26 C.F.R. § 1.501(c)(3)-1(d)(3)(i)(b) provides that an educational organization may advocate a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of facts as to permit an independent opinion or conclusion to be reached.

study, or research is oriented to issues and requires a fair exposition of both sides of the issue involved. An organization's position on a particular issue may be partisan even though the position advocated has not become identified with any particular organized political party, and, conversely, it can be nonpartisan even though the issue is the subject of hotly contested legislation. The organization's position may be nonpartisan in relation to party politics, and still be partisan on a particular issue, and the issue may or may not be politically significant.

Section 4945(e) of the 1954 Code also permits private foundations to provide "technical advice or assistance" to a legislative body in response to a written request without incurring the penalty of having the expense deemed a taxable expenditure. The regulations under section 501(c)(3) do not refer to technical advice or assistance as such. Regulations under section 4945(e) provide that technical advice or assistance need not qualify as nonpartisan analysis, study, or research. Technical advice or assistance must be specifically requested, as must the offering of opinions or recommendations, and must be available to every member of the requesting committee.[23]

In addition to nonpartisan analysis, study, or research and technical advice or assistance, the Treasury regulations under section 4945(e) also exclude from taxable expenditures communications with members of legislative bodies that are an examination or discussion of broad social, economic, or similar problems. Such communications, however, must not be directly addressed to the merits of a specific legislative proposal being considered.[24]

The part of NARP's operations involved in the advocacy of the interests of railroad passenger consumers on legislative matters does not consist of activities which qualify as nonpartisan analysis, study, or research; nor can NARP's efforts on legislative matters properly be categorized as technical advice or assistance. NARP presented its information in a manner which would advance most forcefully its position that rail passenger service must be preserved. NARP was

---

[23] 26 C.F.R. §§ 53.4945-2(d)(2) (i) and (ii) (1973)

[24] 26 C.F.R. § 53.4945-2(d)(4) (1973).

partisan on this issue, and the materials submitted in support of its position were not the full and fair objective expositions that would enable the public or an individual to reach an independent conclusion. NARP was nonpartisan from the standpoint of political party organization. It was partisan, however, on issues of passenger train discontinuances.

Recapitulation of the facts shows that NARP's legislative program was not "analysis, study, or research." Plaintiff, on behalf of NARP, appeared four times to testify and, in addition, made four written submissions to committees of Congress on pending legislation of concern to NARP. In addition, plaintiff made personal presentations to approximately five to 10 Members of Congress and personally conferred with from 15 to 30 congressional staff personnel on pending legislation that could affect the rail passenger. To further its goals and to focus its legislative programs, NARP retained a permanent Washington representative that warranted it possessed expertise in the fields of public relations, education, and congressional lobbying. NARP's Washington representative, on its behalf, performed the myriad activities incident to NARP's appearances before, or submissions to, congressional committees and conducted a continuing research program to keep abreast of railroad-related matters that were legislatively significant. NARP's Washington representative also made personal presentations to Members of Congress and to congressional staff personnel on legislation of concern to NARP. In 1967 and 1968, NCA entertained at cocktails or luncheon for this purpose five Members of Congress, 16 legislative or administrative assistants to Members of Congress, and six professional or technical staff members of congressional committees. These activities, which were all part of the same partisan program, are more in accord with concepts of attempts to influence legislation rather than concepts that apply to the making available to governmental bodies nonpartisan analysis, study, or research.

NARP's efforts in legislative matters concerned pending legislation, and, for this reason, do not qualify as an examination or discussion of broad social, economic, or similar problems. Materials presented by NARP contained much information that was technical advice. The information, however, does not qualify as the technical advice or assistance

contemplated by the statute and regulations. A simple invitation to testify or to submit a statement to a congressional committee is not in itself a request for technical advice or assistance. NARP's invitations had been arranged by NARP's Washington representative as part of its efforts to influence legislation and were not independent requests from the committee for specific technical advice or assistance. In these circumstances, the committees' invitations merely afforded an opportunity for a representative of the railroad passenger segment of the community to advocate its position.

Determination that NARP's operations relative to legislation were political activities and not excusable as nonpartisan analysis, study, or research, as technical advice or assistance, or as examination and discussion of broad social, economic, or similar problems does not dispose of the case. NARP's political activities must be compared with its exempted charitable and educational activities to determine whether the attempts to influence legislation were a substantial part of NARP's operations.

Although a percentage test is not determinative of substantiality, one measure of the relative significance of NARP's various activities in relation to its objectives is the amount of money devoted to each category of operations. In such analysis, the principle employed to allocate expenditures among the various classes of functions is crucial to the ultimate determination. Defendant would allocate certain administrative costs to legislative activities, but, in general, would exclude administrative overheads from its comparison of the costs of legislative activities on the one hand to the costs of NARP's educational and litigative activities on the other. Neither plaintiff's nor defendant's method of allocating expenditures provides an adequate measure of NARP's legislative activities in the context of plaintiff's total program.

In 1967, NARP's monetary expenditures necessarily reflected the problems involved in its initial organization and start-up. In 1968, NARP's administrative expenditures reflected a continuation of its membership solicitation efforts in addition to the costs of support activities that are essential to a going operation. NARP's support activities included, in addition to general office salary and overhead expenditures,

expenditures for preparation of press releases and for printing and duplication of the information generated by NARP.

Defendant would allocate some of these support expenditures, at least those related to press releases and printing and duplication costs, to specific legislative activities. NARP was a small operation and its accounting function was not sufficiently refined to distribute costs of press release preparation and, except for the Southern Pacific Report, the costs of printing and duplication, in such specific detail. To allocate these costs to specific legislative activities, as proposed, in the light of NARP's actual operations, is arbitrary. As a going concern, moreover, NARP necessarily had to provide this type of ancillary support activity for its litigative and educational operations as well as its legislative activities. NARP's expenditures for press release preparation and distribution, and for printing and duplicating, included costs related to its charitable operations. Such expenditures are for normal support activities and, in the absence of records that permit precise distribution, properly should be included in the category of NARP's administrative expenditures.

Defendant would exclude administrative costs and would have only expenditures for NARP's charitable activities and educational activities considered in the determination of whether NARP's legislative activities were substantial. In an operation as small as NARP's, the costs of administrative functions necessarily consume a relatively large share of the total budget. Without such functions, however, the organization would not be viable. Exclusion of expenditures for administrative functions, even if it were possible to allocate some of the costs directly to legislative activities, does not put NARP's political efforts in proper perspective. According to defendant's allocation, for example, NARP's legislative activities in 1967 accounted for 76.1 percent of its expenses, and for 30.5 percent in 1968. Without these essential administrative functions, none of NARP's program could have been pursued, and inclusion of their costs is required to weigh the substantiality of NARP's legislative activities in its total operations.

Both plaintiff and defendant request that the expenditures made to NCA be allocated either to legislative activities or

to exempt charitable activities. The primary purpose for which plaintiff secured the services of NCA was to develop and implement NARP's legislative program. NCA's function was to lobby in Congress and in those sectors of the executive branch that could be influential on railroad legislation. NCA's efforts in NARP's initial organization and in the selection of a prestigious board of directors for NARP were to develop an organization that would effectively obtain legislative goals. The time and effort devoted by NCA personnel to these organizational and consultative activities for NARP were incidental to its lobbying service and were part of NARP's legislative activities. For this reason, all of the expenditures by NARP to NCA properly should be allocated to attempts to influence legislation.

Amounts contained in NARP's travel and entertainment account have been allocated to legislative activities rather than to administrative overhead. Plaintiff acknowledges that the majority of NARP's travel and entertainment expenses were related to plaintiff's trips between Chicago and Washington to confer with NCA and were predominantly for the purpose of influencing legislation. In the absence of detail that would permit allocation to specific nonlegislative activities, inclusion of the entire transportation and entertainment expense accounts of NARP as part of its legislative activities is appropriate.

Allocation of NARP's expenditures on the foregoing basis shows that in 1967, from total expenditures of $50,259.12, NARP used $10,324.98, or 20.5 percent, on political activities. In 1968, from total expenditures of $103,761.12, NARP used $19,897.75, or 19.27 percent, on political activities. If an allocation is made for a salary to plaintiff, the percentage for political activities would be 17.04 percent in 1967, and 16.6 percent in 1968. These percentage relationships are an indication of the relative importance of legislative activities in NARP's total effort. The dollar amounts involved, although minuscule when compared to legislative expenditures of many organizations, are not de minimis. For an organization that operates on as small a total budget as NARP to devote so much of its total resources to legislative activities, it fairly can be concluded that its purposes no

longer accord with conceptions traditionally associated with a common-law charity.

Distribution of expenditures is only one measure of the substantiality of NARP's political activities. Plaintiff's arrangements with NCA prior to NARP's incorporation also indicate the importance of legislative efforts in plaintiff's program as a whole. The primary reason for securing NCA's services was to facilitate NARP's effort to make its position known on the ICC's legislative proposals to amend the Interstate Commerce Act. Before NARP was incorporated, plaintiff had acknowledged to NCA that his objective would require "substantial legislative action by the Congress." Further, NARP's brochure—"*Yes—What's the real story about railroad passenger service?*"—asserted a need to maintain permanent Washington representation "to work for the preparation of constructive legislation."

Attempts to influence legislation were not secondary or incidental to NARP's charitable purposes. The legislative program was a primary objective in NARP's total operations for preservation of railroad passenger service and is on an equal footing with its educational and litigative efforts.

The section 501(c)(3) regulations state that an organization will be considered as operated exclusively for an exempt purpose only if it engages primarily in activities which accomplish its exempt purposes. An organization is not exclusively operated for charitable purposes if more than an insubstantial part of its activities is not in furtherance of exempt purposes. Inasmuch as NARP's political activities were more than insubstantial, and such activities were not ancillary to NARP's charitable purposes, it follows that NARP did not satisfy the requirement that it be exclusively operated for exempt purposes, as required by the regulation.

II

Plaintiff asserts that interpretation of section 170(c)(2) to deny a charitable deduction for the payments to NARP in the circumstances of this case would infringe his rights to freedom of speech and peaceably to petition the legislature for redress of grievances under the first amendment, and the right to equal protection of the laws under the fifth amend-

ment of the Constitution. Challenges to the constitutionality of the limitations in sections 170(c)(2) and 501(c)(3) have not been ruled upon finally by the Supreme Court and the same issues now are pending in lower courts.[25]

The danger of restrictions on first amendment rights long has been recognized and, in recent years, has been the subject of extensive reexamination. In other contexts, the Supreme Court has ruled that discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech, and to deny a tax exemption to claimants who engage in certain forms of speech in effect is to penalize them for such speech. The deterrent effect is the same as if the Government were to fine the claimants for such speech.[26] A discrimination that impairs fundamental rights protected by the first amendment by placing a condition on a benefit or a privilege, as distinguished from a right, infringes the Constitution.[27]

Plaintiff relies upon *Speiser*, which struck down as violative of procedural due process a California statute that required a loyalty oath as a condition for a property tax exemption. Subsequently, the Supreme Court distinguished *Speiser* in *Cammarano* v. *United States*,[28] a case which, on its facts, is more apposite to the NARP relations. In *Cammarano*, the Supreme Court upheld regulations promulgated under the Internal Revenue Code of 1939 that excluded from deductions for "ordinary and necessary" business expenses sums that were expended "for the promotion or defeat of legislation." The Supreme Court upheld the regulation as expressive of the "sharply defined policy" of Congress that applied to the tax status of organizations that were otherwise qualified for exemption but which engaged in activities designed to promote or defeat legislation.[29] As to the first

---

[25] *"Americans United" Inc. v. Walters*, 73-1 U.S.T.C. ¶9165 (D.C. Cir. 1973). On June 4, 1973, the Supreme Court granted review of the ruling below on the question of eligibility of an exempt organization to injunctive or declaratory relief under the Anti-Injunction and Declaratory Judgment Acts. *Walters* v. *"Americans United" Inc.*, 412 U.S. 927 (1973). The Supreme Court ruled on the Anti-Injunction issue on May 15, 1974. *Alexander* v. *"Americans United" Inc.*, 42 U.S.L.W. 4711, 416 U.S. ——.

[26] *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958).

[27] *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

[28] *Cammarano* v. *United States*, *supra* note 11.

[29] *Id.*, 358 U.S. at 512.

amendment issue, the Supreme Court stated that the ruling in *Speiser* was not relevant:

> * * * Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "'aimed at the suppression of dangerous ideas.'" 357 U.S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned. [358 U.S. at 513.]

Justice Douglas, concurring, further distinguished the first amendment restrictions involved in *Speiser* from the policy against attempts to influence legislation that was affirmed in *Cammarano*. Justice Douglas stated:

> * * * If Congress had gone so far as to deny all deductions for "ordinary and necessary business expenses" if a taxpayer spent money to promote or oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser* v. *Randall* * * *. * * * Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right. * * * To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions * * *, and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. * * * [358 U.S. at 515.]

In this case, plaintiff's freedom of speech and right to petition Congress have not been impaired by denial of a tax deduction for his payments to NARP. The exercise of the freedom of speech is not free from taxation. Writers, speakers, newspapers, and similar individuals and organizations whose principal activities frequently directly involve first amendment rights are all subject to nondiscriminatory taxation on their incomes.

Recent authority supports the conclusion that the limitations contained in section 170(c)(2) do not deprive plaintiff of the constitutionally guaranteed right of free speech. In a 1972 case that involved protection to the freedom of religion secured by the first amendment, as well as the rights to free speech, the limitations on political activity in section 501(c)(3) were ruled constitutionally valid by the Tenth Circuit.[30] The court noted that first amendment rights are not absolute and stated:

> In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive Christian Echoes of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption. The parallel to the "Hatch Act" prohibitions relating to political activities on the part of certain federal and state employees is clear: The taxpayer may opt to enter an area of federal employment subject to the restraints and limitations upon his First Amendment rights. Conversely, he may opt not to receive employment funds at the public trough in the areas covered by the restraints and thus exercise his First Amendment rights unfettered. * * *

Plaintiff advances two theories in support of his claim that application of section 170(c)(2) so as to deny the deduction for the payments to NARP would violate his rights to equal protection of the laws. First, such application is said to discriminate between individuals who contribute to charitable organizations in that it makes tax status for charitable con-

[30] *Christian Echoes Nat'l Ministry, Inc. v. United States*, *supra* note 8, 470 F. 2d at 857.

tributions determinative on whether the organization engages in the specifically protected first amendment right to petition the legislature. The class involved would be all individuals who contribute and all organizations which receive charitable contributions. Contributors to an exempt organization that was not engaged in political activities, but whose activities not in furtherance of its exempt purposes were more than insubstantial but less than substantial, would be eligible for a deduction. The deduction would be denied, however, if more than an insubstantial part of the organization's activities was a legislative action proscribed by section 170(c)(2).

Plaintiff's second theory is that equal protection rights would be infringed by the adverse application of section 170(c)(2) because contributors to NARP would be denied a tax deduction for lobbying on the same legislation and issues that businesses are permitted to lobby against, and to deduct, under Section 162(e) of the Internal Revenue Code of 1954, the costs of such lobbying as ordinary and necessary business expenses. Railroad passenger consumers who contribute to NARP would be denied the use of a tax deductible vehicle for carrying on legislative activities against railroads, whereas the railroads, railroad unions, railroad suppliers, and other business organizations involved in the very same legislative activities with respect to the same legislation would have such a deduction.

In federal jurisdictions, rights to equal protection under the laws are derived from due process protections in the fifth amendment. The fifth amendment does not contain an equal protection clause; it does, however, forbid discrimination that is so unjustifiable as to violate concepts of due process.[31] Under the traditional standards, equal protection is denied only if the classification is "without any reasonable basis."[32] Where the classification touches a fundamental right, however, such as interstate movement or first amendment rights, a stricter standard applies, and the classification is judged on the basis of whether it promotes a *compelling* state interest.[33]

---

[31] *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); also *Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969).

[32] *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

[33] *Shapiro* v. *Thompson*, *supra* note 31, 394 U.S. at 638.

The classification described in plaintiff's first theory—all individuals who contribute and all organizations that receive charitable contributions—is too broad. Organizations to which payments are made may be divided into at least two classes on the basis of purpose and scope of operations. A small organization that devotes a substantial part of its energies and resources to attempts to influence legislation has a different purpose than a large organization that utilizes only an insubstantial and relatively small part of its total resources for such legislative activities.[34]

Section 170(c)(2)(D) makes such a classification appropriate. Contributors to an organization whose political activities involve only an insubstantial part of its total efforts are motivated to different objectives, and their interests permit recognition as a separate class. Contributors to an organization that has as a primary purpose political action and whose political activities require a substantial part of its total efforts, on the other hand, have different interests and objectives for their payments.

Congressional interest in prevention of the use of tax funds to support lobbying is compelling. Attempts to influence legislation are not the same as educational, charitable, religious, or scientific activities and they involve well-recognized dangers to representative Government procedures. Congress is not required to grant tax subsidies, directly or indirectly, to the affluent. The tax laws are not an appropriate vehicle for the Government to undertake to determine the extent to which a charitable organization's attempts to influence legislation involve the public interest or are to further other interests.

With respect to the classification in plaintiff's second theory—a class of charitable organizations and a class of business organizations—such division has been long recognized and is reasonable. Congress has recognized the propriety of a deduction as an ordinary and necessary expense

[34] This classification was suggested in the concurring opinion in *"Americans United" Inc.* v. *Walters*, *supra* note 25, as follows:

"In short, it is certainly arguable that small groups are not being treated differently by § 501(c)(3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation." 73-1 U.S.T.C. at 80,225.

for business with respect to legislation or proposed legislation that directly affects the ability of business to produce income and to pay taxes thereon. The deduction is related to the profit-motivated activities of the taxpayer. Activities of charitable organizations stem from different motivations, and contributions to such organizations are matters of personal concern. Absence of a standard generally applicable justifies differentiation in a separate class.

NICHOLS, *Judge*, concurring:

I concur in the result. The trial judge holds that National Association of Railroad Passengers (NARP) the donee of plaintiff's contributions, was disqualified because not operated exclusively for the purposes required by IRC of 1954, § 170(c)(2)(B) *and* (emphasis supplied) a substantial part of its activities involved attempts to influence legislation per § 170(c)(2)(D). I deem the former holding clearly correct. *Slee* v. *Commissioner*, 42 F. 2d 184 (2d Cir. 1930). An organization like NARP has a choice of seeking its ends by advocating or opposing legislation in Congress or by "public interest" litigation in the courts. NARP did both. The former is the most direct possible form of petitioning for redress of grievances under Amendment I of the Constitution. To hold that an organization that has qualified under subsec. (B) loses its status because it petitions even though in the most correct and lawful fashion, but not if it litigates, however unethically, or foments litigation, is to create a discrimination that raises constitutional difficulties for me that neither the trial judge nor the authorities he cites wholly resolve. Cases should be decided if possible without raising or dealing with Constitutional difficulties and this can be done here by resting the decision on subsec. (B) and not going on to subsec. (D) on the hypothesis, contrary to fact, that the organization qualifies so far as (B) is concerned.

CONCLUSION OF LAW

Upon the foregoing opinion and the findings of fact, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX B — FINDINGS OF FACT

ANTHONY HASWELL

1. Plaintiff, Anthony Haswell, during the years 1967 and 1968, resided at 413 Wrightwood Avenue, Chicago, Illinois 60614, and filed individual federal income tax returns for those years with the District Director of Internal Revenue, Chicago, Illinois. Plaintiff's returns were filed on a calendar year basis, and the cash basis method of accounting was used for bookkeeping and federal income tax purposes. He timely paid the following taxes declared on the returns:

Year	Amount
1967	$7,783.67
1968	$23,059.96

2. During 1967 and 1968, plaintiff made payments to the National Association of Railroad Passengers (NARP), or to the Zephyr Defense Fund (ZDF) of NARP, in the following amounts:

1967

May 18, 1967	$5,864.23 *
July 13, 1967	5,000.00
September 6, 1967	4,000.00
September 27, 1967	8,000.00
November 18, 1967	6,000.00
November 30, 1967	5,000.00
December 1, 1967	4,000.00
December 12, 1967	4,000.00
Total	$41,864.23

* Organizational expenses of NARP totaling $5,864.23 were paid by plaintiff on or about May 18, 1967.

January 16, 1968	$10,000.00
March 7, 1968	10,000.00
March 7, 1968	5,000.00 *
April 4, 1968	2,000.00 *
May 3, 1968	10,000.00 *
May 14, 1968	20,000.00
August 22, 1968	10,000.00
August 22, 1968	2,000.00 *
October 4, 1968	5,000.00
October 21, 1968	5,000.00
October 21, 1968	1,000.00 *
December 9, 1968	10,000.00
Total	$90,000.00

** Paid to the Zephyr Defense Fund.

3. On plaintiff's 1967 and 1968 income tax returns, payments to NARP and ZDF were not claimed as charitable contribution deductions. On April 13, 1971, plaintiff filed timely income tax refund claims for 1967 and 1968 with the District Director of Internal Revenue, Chicago, Illinois, in the following amounts:

Year	Amount
1967	$2,765.95
1968	$9,840.06

The Internal Revenue Service disallowed plaintiff's refund claims for 1967 and 1968 by letters dated December 17, 1971. Neither letter gave reason for such disallowances.

4. Plaintiff caused NARP to be organized and, with two other individuals, had it incorporated on May 18, 1967, under the "General Not For Profit Corporation Act" of Illinois, 32 Ill. Rev. Stat. §§163a *et seq.* Plaintiff's personal funds have been the major source of income for NARP. In 1967, plaintiff's payments were equal to 83.2 percent of NARP's total expenditures of $50,295.12. In 1968, plaintiff's payments were equal to 86.7 percent of the $103,761.14 total expended by NARP and ZDF. No portion of plaintiff's payments to NARP and ZDF were derived from the railroad industry.

5. After NARP was formed, plaintiff devoted full time to its affairs. Plaintiff has been NARP's only chairman, and in 1967 and 1968 plaintiff also acted as executive director. During 1967 and 1968, plaintiff was paid no salary by NARP; and the only money received by plaintiff from NARP was reimbursement for entertainment and travel expenses. Total travel and entertainment expenses of NARP were $1,025.71 in 1967 and $3,208.37 in 1968. The value of plaintiff's services to NARP in 1967 and 1968 was approximately $40,000 per annum.

6. (a) In 1967 and 1968, 10 percent of plaintiff's time on NARP matters was devoted to activities that were attempts to influence pending legislation or to secure legislation sought by NARP. In this period, the remaining 90 percent of plaintiff's time for NARP was devoted to administrative affairs, litigation, or educational matters.

(b) Plaintiff's attempts to influence legislation for NARP in 1967 and 1968 included the following activities:

Appendix B — Findings of Fact

(1) Four appearances to testify as a witness before committees of Congress that were considering legislation which would affect rail passengers;

(2) Four written statements or letters submitted to committees of Congress on pending legislation of concern to NARP;

(3) Personal interviews with approximately five to 10 members of Congress, most of whom were members of committees or subcommittees which had legislation pending that could affect the rail passenger; and

(4) Conferences with staff personnel employed either by members of Congress or by congressional committees on pending legislation that could affect the rail passenger; approximately 12 to 15 in 1967 and with an additional 15 such staff personnel in 1968.

(c) Each of plaintiff's appearances as a witness before a congressional committee was in response to an invitation from the committee that had been arranged by NARP's Washington representative. In each instance that plaintiff testified before, or submitted written materials to, committees of Congress, the testimony or materials stated NARP's position on behalf of the consumer rail passenger of the United States. No part of

plaintiff's testimony before, or submissions to, legislative committees in 1967 and 1968 was partisan from the standpoint of identification with any particular political party.

(d) In 1967 and 1968, plaintiff traveled to Washington from Chicago an average of once every 3 weeks.

(e) In 1967 and 1968, plaintiff made three or four public speeches concerning NARP and rail passengers service to such organizations as the Passenger Club of Chicago and the Washington Chapter of the Transportation Research Forum.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS

Organization

7. NARP was incorporated as a membership corporation. From May 18, 1967 to December 31, 1967, it attracted approximately 1,000 members; as of December 31, 1968, it had approximately 3,000 members. During 1967 and 1968, its only office was located at 333 North Michigan Avenue, Chicago, Illinois. In addition to plaintiff, NARP's staff, during 1967 and 1968 consisted of one full-time secretary and one clerical position that was filled for varying periods of time by four different full-time employees to September 1968 and thereafter, by periodic temporary help until the end of 1968. During 1967 and 1968, NARP made no distributions of money, payments for services rendered, or loans to any contributor, and NARP did not engage in security transactions with any contributor. NARP has no outstanding stock and has never owned any corporate stock.

Appendix B — Findings of Fact

8. NARP's books were maintained on the cash basis method of accounting and income tax returns for the years 1967 and 1968 were filed on a calendar year basis. NARP has a letter from the Internal Revenue Service holding it to be an exempt organization under Section 501(c)(4) of the Internal Revenue Code of 1954. NARP did not apply to the Internal Revenue Service for classification, in 1967 and 1968, as a section 501(c)(3) organization on advice of counsel at that time because NARP planned to get involved to some extent in legislation and in litigation.

9. The purposes of which NARP was organized are set forth as follows in its Articles of Incorporation and in its By-Laws:

> All for the promotion of the common good and general social welfare and the bringing about of civic betterments and social improvements, to act as a focal point for, and either by itself or in conjunction with other associations, groups or individuals to undertake, programs and actions designed to encourage and promote the maintenance and improvement of passenger services, operations and facilities of American railroads, including, without limitation, the promotion of federal and state assistance to railroads for passenger service operations and the encouragement of American railroads to maintain and enhance present passenger services, operations and facilities.

Appendix B — Findings of Fact

10. NARP's goal was to preserve, improve, and expand railroad passenger service. NARP felt that this goal would be achieved when there existed, among other conditions:

(a) Adequate legal controls over train discontinuances;

(b) Fair and equal governmental treatment of the rail passenger; and

(c) A national transportation policy which included rail passenger service as an essential element.

11. NARP has never participated in, or contributed to, a political campaign, and materials produced by NARP were not partisan from the standpoint of identification with any particular political party. In its attempts to influence legislation, NARP advocated the interests of the consumer railroad passengers of the United States. Testimony by NARP's representatives and the written materials submitted by NARP to committees of Congress did not represent nonpartisan analysis, study, or research in that they were not the type of full and fair objective expositions that would enable the public to reach independent conclusions. NARP's testimony and written materials advocated a particular position and were partisan on the issue of the necessity to continue rail passenger service. In view of the complexities of rail industry operations and its regulation, much of NARP's testimony and written materials necessarily included technical advice or assistance.

Appendix B — Findings of Fact

Educational Activities

12. (a) Educational and informational activities undertaken by NARP in 1967 and 1968 to inform the public on problems that affected the rail passenger consumer included publication of a report, a brochure, a train survey, some of the materials in NARP's press releases, and public speeches by plaintiff to such organizations as the Passenger Club of Chicago and the Transportation Research Forum.

(b) NARP prepared, printed, and distributed over 10,000 copies of a brochure entitled "*Yes — What's the real story about railroad passenger service?*" This brochure identified NARP and presented the problems involved in and need for improved railroad passenger service. The brochure asserts that railroad passenger service is an "essential, useful, and valuable national asset which must be preserved, improved and expanded." NARP viewed two changes in Government policy as urgently needed to accomplish these goals:

> — Stronger legal controls over discontinuance of passenger trains, and greater consideration of the over-all public interest in continued passenger service in individual cases.
>
> — Positive government action to aid, encourage and promote rail passenger service, including equal treatment for railroads by government in relation to other forms of transportation.

Appendix B — Findings of Fact

NARP's program of action was defined as follows:

> Legislative —
>
> Maintain permanent representation for our Association in Washington to work for the passage of constructive legislation and to keep continuing liaison with all branches of government.
>
> Regulatory and Judicial—
>
> Oppose specific proposals for discontinuance of passenger trains when, in our judgment, the overall public interest justifies such opposition.
>
> Educational—
>
> Undertake a continuing program to acquaint the public with the advantages and benefits of good rail passenger service, the underlying economic and political issues of the problem, and the pros and cons of passenger service and passenger policies of the various railroads.

To help in this program, the brochure encouraged those interested in preservation of railroad passenger service to join NARP and to consider rail service in their own travel plans. The brochure contained a membership application form. Readers were told they could "make your voice heard" through

newspaper letter columns, at community meetings, or before regulatory bodies when rail service affecting the community was threatened. The brochure suggested that NARP's services would facilitate direct and timely communications to Congress. It said:

> You can let your Senators and Congressmen know your position when bills affecting passenger service are up for consideration by committees or by the Senate or House. As a member of the Association you will be kept informed of legislative developments so that you may make your views known in Washington at the right time.

The cost in 1967 of publishing the NARP brochure on rail passenger service was $1,141.24, exclusive of mailing and distribution costs.

(c) In 1967, plaintiff wrote on behalf of NARP a report on the Southern Pacific Railroad. This report — The Southern Pacific and Railroad Passenger Service — was a reply to a report that had been published by the Stanford Research Institute. The Southern Pacific report was published by NARP in November 1967. Editing and printing costs totaled $1,843.93 in 1967 and $2,205.50 in 1968.

(d) On January 29, 1968, NARP released a survey of applications for passenger train discontinuances during the last half of 1967. This compilation of applications for abandonment of operations related the total number of intercity trains

operated by 38 railroads on July 1, 1967, to the number operated on December 31, 1967, and summarized discontinuance proceedings pending on January 1, 1968. The survey results were published in the Congressional Record of February 15, 1968, by Senator Gordon Allott of Colorado.

Litigation Activities

13. (a) NARP's litigation activities in 1967 were limited to two or three letters to the Interstate Commerce Commission to protest passenger train discontinuances. In 1968, NARP was represented by counsel in seven discontinuance proceedings at the ICC, as well as in the ICC "adequacies" case, an investigation to determine whether ICC had jurisdiction to regulate the adequacy of passenger train service. In 1968, NARP also was represented by counsel in a case before the Ohio Public Utilities Commission relative to the Penn Central's curtailment of passenger service in Ohio. These various litigation activities required NARP to retain the services of a cost expert and a marketing consultant.

(b) Discontinuance proceedings at the ICC in which NARP participated related to the "California Zephyr," the "City of San Francisco," and the "Georgian," as well as discontinuances that involved the Chesapeake and Ohio Railroad, Southern Pacific Railroad, and the Penn Central Railroad's proposal to abolish baggage car service.

(c) NARP's principal attorney for litigation in 1968 was Andrew P. Goldstein, a specialist in the Interstate Commerce Act and related laws. Goldstein represented NARP in all ICC

matters other than the "Georgian" discontinuance case. He billed NARP at a reduced *pro bono publico* rate for his services. No part of Goldstein's legal representation of NARP directly involved legislation or attempts to influence legislation. On occasion, Goldstein would counsel plaintiff on the effect of proposed legislation and at times plaintiff or other persons connected with NARP would refer congressional staff members to Goldstein for information on the status of specific ICC matters. Less than 5 percent of the time Goldstein worked for NARP was in any way related to the legislative branch of the Government.

(d) NARP had no litigation expenses in 1967. In 1968, total funds expended on litigation expenses by NARP totaled $30,450.47, of which NARP paid $8,495.18 and ZDF paid $21,955.29. This includes total fees to Goldstein of $14,047.41, and a total of $5,010.48 for the related expenses of the cost expert and the marketing consultant.

Attempts to Influence Legislation

14. In 1967 and 1968, NARP participated in proceedings in both Houses of the United States Congress in connection with legislation proposed by the Interstate Commerce Commission and to amend Section 13(a) of the Interstate Commerce Act[1] that would affect the manner in which the ICC could grant train service discontinuances. In its attempts to influence legislation, NARP retained a consulting firm as Washington representative. In addition to dealings with members of Congress and

1. 49 U.S.C. §13(a) (1970).

congressional staff personnel, NARP's Washington representative had meetings and discussions with staff personnel, whose duties involved legislative responsibilities, at the Interstate Commerce Commission and at the Department of Transportation.

15. (a) NARP's Washington representative, after June 5, 1967, and during all of 1968, was National Counsel Associates (NCA), 421 New Jersey Avenue, S.E., Washington, D.C. The primary reason the services of NCA were engaged was to facilitate NARP's effort to make its position known on legislative proposals by the ICC to amend Section 13(a) of the Interstate Commerce Act. On May 9, 1967, plaintiff explored with Maurice Rosenblatt the possiblity that NARP retain NCA and, on May 12, 1967, outlined the ways NCA could serve NARP. Plaintiff's May 12, 1967, letter contained a statement of NARP's goals and included the following observations as to possible activities to accomplish these goals:

> An outline of the position and program of the Association is enclosed. (This is *not* a final draft.) Achievement of these goals requires political action at the national level. Members will help bring this about by contributing their money and by writing letters to their representatives in Washington at the appropriate time. I believe that Congress will respond favorably to our program if it is convinced that a significant number of people are really interested.

* * *

Appendix B — Findings of Fact

> It is my position that your organization can perform a valuable service to our Association by representing us in legislative matters before the Congress, and perhaps promote our interests within the Executive departments as well. I repeat that our objectives will require substantial legislative action by the Congress. The immediate need is to strengthen controls over discontinuance of passenger service by the various railroads.* * *

(b) NARP executed a contract with NCA on June 5, 1967, signed on behalf of NARP by Anthony Haswell, executive director, and by Maurice Rosenblatt, a partner in National Counsel Associates. Under the contract, NCA was to provide counseling services and assistance for the purpose of "promoting and furthering the goals of NARP." NCA warranted that it "possesses expertise in the fields of public relations, public education and Congressional lobbying and that it enjoys a good reputation in these fields in the Washington, D.C. community." Responsibility for planning and carrying out NARP programs was given to NCA, subject to NARP's right to veto any program suggested. Prior to undertaking any program, NCA was required to obtain the approval of NARP, and NCA was to report to and consult with NARP not less frequently than once a month with respect to approved programs. Compensation for NCA's services was fixed at $1,250 per month plus reimbursement for out-of-pocket expenses submitted by itemized monthly statement. Out-of-pocket expenses in excess of $125 per month required prior written consent of NARP.

(c) In the event federal regulation of lobbying statutes required registration of NCA or NARP, the NCA-NARP agreement provided that NCA would take such action as necessary for compliance with the statutory requirements and would advise NARP of any statutory provisions which would require NARP to register or to take any other action. NCA, NARP, and plaintiff, Anthony Haswell, filed quarterly reports for the second, third, and fourth quarters of 1968 with the Clerk of the House of Representatives and the Secretary of the Senate pursuant to the Federal Regulation of Lobbying Act.[2]

(d) In 1967, a total of $9,299.27 was paid by NARP to NCA; $8,750 for services and $549.27 for expenses. In 1968, NARP paid a total of $16,689.38, of which $15,000 was for services and $1,689.38 was for expenses.

16. (a) Maurice Rosenblatt and Woodruff M. Price of NCA handled the NARP account. Price was responsible for the day-to-day servicing of the account and was the NCA representative most directly involved in NARP's attempts to influence legislation. Rosenblatt spent relatively little time in connection with NARP and much of the time he did spend was on consultative matters. In 1967, Price accounted for approximately 75 percent to 85 percent of the time provided by NCA to represent NARP. In 1968, Price accounted for approximately 85 percent to 95 percent of NCA's time provided to NARP. In each year, the remainder of the time on the NARP account was furnished by Rosenblatt.

2. 2 U.S.C. §§261-70 (1970).

(b) Rosenblatt's activities for NARP during 1967 and 1968 included: (1) consultation on NARP policy, primarily fund raising matters; (2) obtaining and checking mailing lists; (3) consultation and assistance to obtain prominent citizens as members of an advisory board for NARP in 1968; (4) discussions with journalists or magazine writers about NARP; and (5) on approximately five occasions, arrangements for meetings between plaintiff, Price, and various Members of Congress. In addition, Rosenblatt was host at two or three cocktail parties given on behalf of NARP, at which plaintiff was afforded an opportunity to talk with Members of Congress and their legislative and administrative assistants, as well as with selected staff members of congressional committees, about the broader policy aspects of rail transportation and NARP's legislative goals for adequate passenger train service.

(c) In mid-1967, 25 percent of Price's time was provided to the NARP account; this proportion increased to 50 percent at the beginning of 1968, and was 75 percent by the end of 1968. During 1967 and 1968, 85 percent of Price's time for NARP directly involved legislative matters. The remaining 15 percent of Price's NARP efforts involved organization affairs and other indirect legislative efforts. Price's time that directly involved attempts to influence legislation included:

> (1) Activities incident to plaintiff's appearances before or statements submitted to congressional committees, including participation in the formulation of NARP's position on the specific legislation, drafting and editing statements and testimony, and accompanying plaintiff in appearances;

(2) Research of legislative publications and reports and analysis of statements of Members of Congress so as to keep abreast of railroad-related matters; and

(3) Personal presentation, either alone or with plaintiff, of NARP's views on pending legislation to Members of Congress, to their legislative or administrative assistants, or to staff members of congressional committees at informal meetings in legislative offices or over lunch or cocktails. In 1967 and 1968, NCA entertained at cocktails or luncheon, for the purpose of presenting NARP's views on pending legislation, five Members of Congress, 16 legislative or administrative assistants to Members of Congress, and six professional or technical staff members of congressional committees.

Price's time for NARP on indirect legislative activities included:

(1) Advice on fund raising and on the formation of the NARP advisory board;

(2) Meetings with representatives of railroad management, the press, railroad unions, and employees of the Department of Transportation and the Interstate Commerce Commission concerned with railroad legislation to establish NARP as a legitimate spokesman for passengers;

(3) Service to congressional offices as a clearing house for information about train discontinuances; and

(4) Solicitation of newspapermen for a favorable press on NARP.

17. NARP's appearances before congressional committees, arranged for by NCA, during which plaintiff testified as executive director, are as follows:

(a) August 1, 1967, before the Senate Committee on Commerce, Subcommittee on Surface Transportation, on S. 512, S. 1685, S. Cong. Res. 25, and S.J. Res. 52, 90th Cong., 1st Sess. S. 512 and S. 1685 proposed to amend Section 13(a) of the Interstate Commerce Act with respect to passenger train discontinuances. S. Con. Res. 25 expressed the sense of Congress that the Secretary of Transportation study the potential of rail passenger transportation, and other matters. S.J. Res. 52 proposed to direct the Secretary of Transportation and ICC to prepare a master ground transportation plan for the United States and to require approval by all affected states of any passenger train discontinuances during the preparation of such master ground transportation plan.

(b) March 28, 1968, before the Senate Committee on Banking and Currency, Subcommittee on Housing and Urban Affairs, on the effect of railroad mergers on commuter transportation. At this hearing, Price accompanied plaintiff and also testified.

(c) July 17, 1968, before the Senate Committee on Commerce, Subcommittee on Surface Transportation, on S. 3237 and H.R. 16024, 90th Cong., 2d Sess., legislation to extend the High Speed Ground Transportation Act of 1965.

(d) July 24, 1968, before the Senate Committee on Commerce, Subcommittee on Surface Transportation, on S. 3861, 90th Cong., 2d Sess., on proposed criteria to apply to passenger train discontinuance applications relative to last train service, and other matters.

18. NARP submitted statements or letters to congressional committees on pending legislation, by plaintiff as executive director pursuant to arrangements made by NCA, as follows:

(a) June 5, 1968, to the House of Representatives Committee on Interstate and Foreign Commerce, on H.R. 16980, 90th Cong., 2d Sess., a proposal to authorize the Secretary of Transportation to establish safety standards, rules, and regulations for railroad operations.

(b) June 19, 1968, to the House of Representatives Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, on H.R. 16024, 90th Cong., 2d Sess., a bill to extend the High Speed Ground Transportation Act of 1965.

(c) June 28, 1968, to the House of Representatives Committee on Interstate and Foreign Commerce, on H.R. 18212, 90th Cong., 2d Sess., a proposal to amend the Interstate Commerce Act to shift the burden of proof on applications for passenger train discontinuances as to burden on interstate commerce, and to give the ICC exclusive jurisdiction over last-operated passenger train discontinuances, and for other purposes.

(d) July 16, 1968, to the House of Representatives Committee on Interstate and Foreign Commerce, Sub-committee on Transportation, on H.R. 18212, 90th Cong., 2d Sess. NARP suggested that the bill be amended so that the proposed rail passenger study be conducted by an independent commission, to be financed by both Government and private sources, and representative of all interested groups.

Appendix B — Findings of Fact

Administrative Activities

19. (a) NARP's administrative activities primarily involved organization and membership solicitation. Administrative activities include advertising, press releases, and supporting services.

(b) NARP used advertising to obtain new members. All such advertising included information on issues concerning rail passenger service, and all had membership applications included. One ad, entitled "Are People as Important as Pigs," appeared one or more times in Trains magazine, Harpers, Atlantic Monthly, Wall Street Journal, and Railroad magazine. Advertising expenses incurred by NARP totaled $12,588.39 in 1967 and $563 in 1968. None of NARP's ads urged readers to exert public pressure on Members of Congress in order to achieve a desired legislative result.

(c) NARP issued 29 press releases, 10 in 1967 and 19 in 1968. One of the 1967 press releases and three of the 1968 press releases referred to activities that involved attempts to influence legislation.

(d) NARP's publicity was developed with William G. Hetherington & Co., a Newark, New Jersey, public relations firm. In addition, National Counsel Associates participated in preparation of press releases which involved plaintiff's appearances before congressional committees. NARP's press releases were distributed by Derus Media Service. In 1967, William G. Hetherington & Co. received a total of $4,288.19, and in 1968, $8,029.13; Derus Media Service received in 1967 $810.15 and $759.22 in 1968.

(e) Reproduction and printing expenses of NARP totaled $1,849.77 in 1967 and $13,110.69 in 1968. Reproduction expenses included the cost of printing press releases as well as other administrative support expenses as addressing materials for mailing list distribution, printing stationery, envelopes, and paper pads with NARP logograph and maintaining addressograph plates.

(f) NARP paid $1,790.94 in 1967 to the Chicago law firm for legal expenses incurred in NARP's formation and incorporation, and for subsequent legal services not connected with litigation, including NARP's application for a section 501(c)(4) federal income tax status.

Budget

20. (a) In 1967, NARP's total expenditures were $50,259.12. For purposes of this case, these expenditures are allocated as follows:

Educational Activities		
Brochure	$1,141.24	
Southern Pacific Report	1,843.93	$2,985.17
Litigation Activities		
None	—	—

Attempts to Influence Legislation		
National Counsel Associates	9,299.27	
Transportation and Entertainment	1,025.71	10,324.98
Administrative		
General Office Expenses	15,621.53	
Reproduction and Printing	1,849.77	
Public Relations:		
Derus Media Service	810.15	
Wm. G. Hetherington & Co.	4,288.19	
Legal Services	1,790.94	
"Pig" Advertisement	12,588.39	36,948.97
Total		$50,259.12

(b) In 1968, NARP's total expenditures, including its Zephyr Defense Fund, were $103,761.14. For purposes of this case, these expenditures are allocated as follows:

Educational Activities		
Southern Pacific Report	$2,205.50	$2,205.50
Litigation Activities		
Zephyr Defense Fund	21,955.29	
NARP	8,495.18	30,450.47

Attempts to Influence Legislation		
National Counsel Associates	16,689.38	
Transportation and Entertainment	3,208.37	19,897.75
Administrative		
General Office Expense	30,950.88	
Reproduction and Printing	10,905.19	
Public Relations:		
Derus Media Service	759.22	
Wm. G. Hetherington & Co.	8,029.13	
"Pig" Advertisement	563.00	51,207.42
Total		$103,761.14

21. Of NARP's total expenditures in 1967, 20.5 percent were devoted to attempts to influence legislation. In 1968, 19.27 percent of NARP's total expenditures were used in attempts to influence legislation.

22. The value of plaintiff's services to NARP, at approximately $40,000 per annum, was $25,000 in 1967 and $40,000 in 1968. Since 10 percent of plaintiff's time on NARP matters can be allocated to attempts to influence legislation, that category would be increased by $2,500 to $12,824.98 in 1967, and by $4,000 to $23,897.75 in 1968; NARP's total expenditures would be increased to $75,259.12 in 1967 and to $143,761.14 in 1968. On this allocation, 17.04 percent in 1967 and 16.6 percent in 1968 of NARP's total budget would have been used in attempts to influence legislation.

ULTIMATE FINDING

23. NARP, during 1967 and 1968, was not operated exclusively for educational or charitable purposes, and a substantial part of NARP's activities consisted of attempts to influence legislation.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statute involved 2

Statement 3

Argument 5

Conclusion 12

CITATIONS

Cases:

Alexander v. *"Americans United" Inc.*, 416 U.S. 752 6

"Americans United" Inc. v. *Walters*, 477 F. 2d 1169, reversed *sub nom. Alexander* v. *"Americans United"Inc.*, 416 U.S. 752 12

Board of Governors v. *Agnew*, 329 U.S. 441 11

Broadrick v. *Oklahoma*, 413 U.S. 601 11

Cammarano v. *United States*, 358 U.S. 498 8

Christian Echoes National Ministry, Inc. v. *United States*, 470 F. 2d 849, certiorari denied, 414 U.S. 864 10

Kuper v. *Commissioner*, 332 F. 2d 562 ..... 7, 11

League of Women Voters of U.S. v. *United States*, 180 F. Supp. 379 11

Liberty Nat. Bank & Trust Co. v. *United States*, 122 F. Supp. 759 11

Page

Marker v. *Shultz*, 485 F. 2d 1003 10

Seagram & Sons v. *Hostetter*, 384 U.S. 35 11

Seasongood v. *Commissioner*, 227 F. 2d 907 ..... 7, 11

Slee v. *Commissioner*, 42 F. 2d 184 ..... 6, 10

United States v. *Harriss*, 347 U.S. 612 12

United States Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 12

Constitution, statutes and regulation:

United States Constitution:
First Amendment 8
Fifth Amendment 9

Act of September 16, 1919, c. 59, 41 Stat. 284, 285, Sec. 6 10

Act of July 23, 1947, c. 298, 61 Stat. 403, 406, Sec. 5 10

Act of August 6, 1956, c. 976, 70 Stat. 1052, 1055, Sec. 10 10

Act of August 26, 1958, Pub. L. 85-761, 72 Stat. 854, 858, Sec. 10 10

Act of August 27, 1958, Pub. L. 85-769, 72 Stat. 922, 926, Sec. 10 10

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 367, Sec. 201 10

Federal Regulation of Lobbying Act, 60 Stat. 839, *et seq.*, 2 U.S.C. 261-270 4

Page

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):
Sec. 41 .....
Sec. 162(e) 9
Sec. 170 ..... 1, 2, 8, 9
Sec. 170(a) 5
Sec. 170(c)(2)(B) 2, 5, 6
Sec. 170(c)(2)(D) 2, 5, 6
Sec. 501 10
Sec. 501(c)(3) 6
Sec. 501(c)(5) 10

Internal Revenue Code of 1954 (26 U.S.C. (1970 ed., Supp. II)), Sec. 501(c)(19) 10

Treasury Regulations on Foundation Excise Taxes:
Sec. 53.4945-2(d)(1) (26 C.F.R.) 8

Miscellaneous:

Caplin, *Limitations on Exempt Organizations: Politicai and Commercial Activities,* N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations, 265 11

78 Cong. Rec. 5861 6

78 Cong. Rec. 5959 6

Hearings before the House Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, on H. Res. 217, Tax-Exempt Foundations, 83d Cong., 2d Sess., 423, 433-434 11

Hearings before Subcommittee of the House Committee on Appropriations, on Department of the Treasury, Executive Office of the President and Related Agencies Appropriations for 1968, 90th Cong., 1st Sess., 536 (February 17, 1967) 11

Page

Letter ruling to Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664 11

Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793 (1967) 7

Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408 (1954) .. 7

S. Rep. No. 92-1082, 92d Cong., 2d Sess. 10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-445

ANTHONY HASWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A 1a-26a) is reported at 500 F. 2d 1133. The findings of fact of the trial judge (Pet. App. B 27a-51a) are not officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 19, 1974. The petition for a writ of certiorari was filed on October 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner's contributions to the National Association of Railroad Passengers were not deductible as charitable contributions under Section 170 of the Internal Revenue Code

of 1954, because the Association's lobbying activities precluded it from qualifying as an eligible educational or charitable corporation under Section 170(c)(2)(B) or (D).

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):

Sec. 170. Charitable, etc., Contributions and Gifts.

* * * * *

(c) *Charitable Contribution Defined.*—

* * * * *

(2) A corporation, trust, or community chest, fund, or foundation—

* * * * *

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

* * * * *

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * * *

STATEMENT

Petitioner is a federal taxpayer and the organizer of the National Association of Railroad Passengers ("NARP"). In this refund suit, he seeks charitable contribution deductions for his contributions to that organization during 1967 and 1968 (Pet. App. B 27a-29a).

Pursuant to its Articles of Incorporation and By-Laws, NARP was organized "to act as a focal point for * * * programs and actions designed to encourage and promote the maintenance and improvement of passenger services, * * * including * * * the promotion of federal and state assistance to railroads for passenger service operations * * *" (Pet. App. B 32a). It was incorporated as a membership corporation, and by 1968 it had 3,000 members (Pet. App. B 31a). Petitioner's personal funds were the major source of NARP's income, for he contributed $41,-864.23, or 83.2 percent of its total expenditures in 1967, and $90,000, or 86.7 percent of its total expenditures in 1968 (Pet. App. B 27a, 28a, 29a).

From the inception of petitioner's railroad passenger service program, he recognized that attainment of the goal to preserve, improve and expand railroad passenger service would require political action at the national level (Pet. App. A 5a). As a result, petitioner in his capacity of executive director of NARP, testified four times before Congressional committees during 1967 and 1968, and made four written statements to such committees, in connection with legislation to amend the Interstate Commerce Act. Each appearance or submission was designed to attempt to influence pending legislation sought by NARP (Pet. App. A 5a). In 1967 and 1968, 10 percent of petitioner's time on NARP matters was devoted to activities that involved attempts to influence pending legislation or to secure legislation sought by NARP (Pet. App. B 29a).

In 1967, NARP engaged National Counsel Associates (NCA), a Washington consulting firm specializing in lobbying, as its representative before the executive branch and on legislative matters before Congress (Pet. App. A 5a). It outlined the goals of NCA representation by stating that NCA was to "represent us in legislative matters before the Congress, * * * [since] our objectives will require substantial legislative action." In its contract with petitioner's organization, NCA warranted that it "[possessed] expertise in the fields of public relations, public education and Congressional lobbying * * *" (Pet. App. B 40a).

During the last three quarters of 1968, petitioner, NARP, and National Counsel Associates each filed quarterly reports with the Clerk of the House of Representatives and the Secretary of the Senate, pursuant to the Federal Regulation of Lobbying Act, 60 Stat. 839, *et seq.*, 2 U.S.C. 261-270 (Pet. App. B 41a). The partner of National Counsel Associates who did the overwhelming majority of work on the NARP account, devoted 85 percent of his time to legislative matters.[1] These matters included assisting in the preparation of statements and testimony to Congressional committees, research and analysis of views of Congressmen and legislative publications, and personal presentations of NARP's views on pending legislation to members of Congress or their staffs (Pet. App. A 7a; Pet. App. B 42a-43a).[2] For

---

[1]Another partner, who performed only a small percentage of the work for NARP, performed considerable lobbying activities on its behalf (Pet. App. B 41a-42a).

[2]NCA's other services for NARP were incidental to the lobbying activities. For example, NCA assisted NARP in selecting a prestigious board of directors to further legislative goals, and met with personnel in the executive branch who were concerned with railroad legislation (Pet. App. A 7a, 19a).

these services, NARP paid a total of $9,299.27 in 1967 and $16,689.38 in 1968 (Pet. App. B 41a), which, together with related transportation and entertainment expenses, amounted to 20.5 percent of its total expenditures for 1967, and 19.27 percent for 1968 (Pet. App. B 41a, 50a).

The testimony and written statements on behalf of NARP did not represent nonpartisan analysis, study, or research, nor were they full and fair objective expositions that would enable the public to reach independent conclusions. Rather, they advocated a particular position and were partisan to the issue of the need to continue rail passenger service (Pet. App. A 6a). While technical advice and assistance was included in NARP's testimony and submissions, it was not submitted in response to independent requests from Congressional committees for such assistance (Pet. App. A 17a).

On these facts, the trial judge held that petitioner's contributions to NARP were not tax deductible, on the ground that NARP's lobbying activities precluded it from qualifying as an exclusively charitable or educational organization under Section 170(c)(2)(B) of the Code, or from complying with the "substantial" lobbying prohibition in Section 170(c)(2)(D). The Court of Claims adopted the trial judge's opinion *per curiam* (Pet. App. A 1a-26a).

ARGUMENT

1. Section 170(a) of the Internal Revenue Code of 1954 allows an income tax deduction for "charitable contribution[s]." However, Section 170(c)(2)(B) provides that a qualified charitable beneficiary must be "organized and operated exclusively for * * * charitable * * * or educational purposes * * *", and Section 170(c)(2)(D) provides that "no substantial part of the activities * * *

[of the charitable beneficiary may be] carrying on propaganda, or otherwise attempting, to influence legislation."[3]

The Court of Claims correctly held that petitioner's contributions to NARP were nondeductible because that organization did not qualify under either Section 170(c)(2)(B) or 170(c)(2)(D) (Pet. App. A 3a).

Although the tax laws contained no provisions prior to 1934 specifically prohibiting exempt charitable and educational organizations from engaging in lobbying activities, *Slee* v. *Commissioner*, 42 F. 2d 184 (C.A. 2), had held that an organization was not devoted exclusively to charitable or educational purposes if its lobbying was so general as to constitute a separate purpose. However, the court also stated that lobbying "incident" to the success of the exempt purposes—lobbying which is "mediate to the primary purpose"—would not detract from the organization's exclusively exempt purpose or preclude eligibility for tax exemption and tax deductible contributions (*id.* at 185).

Because of the difficulties of administering the *Slee* test, Congress added the specific lobbying proscription in 1934, which is now contained in Section 170(c)(2)(D).[4] That provision states that a donor cannot claim a charitable deduction for a contribution to an organization a "substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." Thus, Section 170(c)(2)(D) establishes a quantita-

---

[3]Essentially identical requirements govern tax-exempt status under Section 501(c)(3). See *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 754-755.

[4]See 78 Cong. Rec. 5959 (remarks of Sen. LaFollette); *id.*, at 5861 (remarks of Sen. Reed).

tive prohibition on lobbying, without regard to its character. See Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412 (1954); Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793, 1794 (1967); *Kuper* v. *Commissioner*, 332 F. 2d 562 (C.A. 3). This substantiality test essentially requires weighing the quantum of lobbying activities against the exempt activities of the organization, which is to be determined on the basis of the facts and circumstances of each case. *Seasongood* v. *Commissioner*, 227 F. 2d 907, 912 (C.A. 6).

2. Petitioner challenges (Pet. 11), the correctness of the factual findings of the court below. He argues that the record does not support the conclusion that a "substantial part" of NARP's activities during the years in question was influencing legislation and attendant lobbying activities. But petitioner overlooks the undisputed fact that National Counsel Associates was a registered lobbying organization, that it warranted to NARP its lobbying expertise, and that National Counsel Associates was hired primarily to represent NARP before Congress on legislative matters. Indeed, petitioner himself stated that 85 percent of the time of the principal representative of National Counsel Associates who handled the NARP account was "spent on matters which could broadly be described as 'legislative' * * *."[5] There was accordingly ample evidence to support the finding that NARP's activities disqualified it from eligibility for tax-deductible contributions.

---

[5]See Plaintiff's Objections to Defendant's Requested Findings of Fact, p. 10, filed April 9, 1973, in the court below.

Petitioner further argues (Pet. 11-12) that the decision below erred in characterizing many of NARP's activities as influencing legislation rather than "nonpartisan analysis." This description is fully supported by the applicable provision in Treasury Regulations, Section 53.4945-2(d)(1)(ii), which defines "nonpartisan analysis" as—

> an independent and objective exposition of a particular subject matter * * *. Thus, "nonpartisan analysis, study, or research" may advocate a particular position or viewpoint *so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.* [Emphasis added.]

However, as the court below found, NARP presented its information in a manner which would advance most forcefully its position that rail passenger service must be preserved. The court's conclusion that NARP's informational activities did not satisfy the italicized portion of the above-quoted regulation is well supported by the evidence (Pet. App. A 15a-16a).

3. Contrary to petitioner's additional contention (Pet. 13-15), the lobbying limitation in Section 170 does not violate his First Amendment right of freedom of speech. This Court unanimously rejected a similar contention 15 years ago in *Cammarano* v. *United States*, 358 U.S. 498, which upheld the prohibition set forth in Regulations under the 1939 Code of a business deduction for funds expended for "the promotion or defeat of legislation." In terms most appropriate to this case, the Court in *Cammarano* stated (*id.* at 513):

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for

those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "'aimed at the suppression of dangerous ideas'."

Nor does the lobbying proscription in Section 170 violate petitioner's right to equal protection under the Fifth Amendment. In so arguing, petitioner relies upon Section 162(e) of the Code, added in 1962, which permits businesses very limited deductions for certain expenses incurred in legislative appearances involving proposed measures of direct interest to the taxpayer. But as the court below explained (Pet. App. A 10a), the policy underlying the limited allowance of lobbying expenses in Section 162(e) was three-fold: (1) since expenses for direct lobbying related to income-producing activities, an accurate measure of net income supports some deduction; (2) similar expenses for administrative and judicial appearances were deductible; (3) as a matter of governmental policy, it was desirable for legislative bodies to have readily available information on the impact of proposed legislation on the trade or business of affected taxpayers.

These considerations do not apply to the activities of non-taxpaying exempt organizations or their donors. Indeed, Congress has a legitimate interest in preventing individuals from making tax-deductible contributions to finance lobbying activities through charities which are exempt from taxes. However, the prohibition is not absolute, for even such exempt organizations are allowed to

engage in insubstantial lobbying activities, as well as nonpartisan analysis of public issues.[6]

4. Finally, petitioner contends (Pet. 10) that the lobbying prohibitions on charities are not sufficiently specific and are thus unconstitutionally vague. In order to be fair to all types of organizations, however, both the Internal Revenue Service and the courts have refused to adopt a mere percentage test, or some other arbitrary standard. See *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849, 855 (C.A. 10), certiorari denied, 414 U.S. 864. Instead, the test used involves consideration of the amounts of time, effort, and money

---

[6]Petitioner's allegation (Pet. 15) that Section 501 unconstitutionally discriminates in favor of veterans and labor organizations, and against charities, because the former are not governed by any specific lobbying prohibition, is without merit. Labor unions are not eligible to receive tax deductible contributions. Unlike charitable and educational organizations, labor unions are exempt from taxation under Section 501(c)(5) primarily because their mutual character makes them unsuitable objects of taxation under a tax system that treats mutual associations differently from independent and integral entities such as corporations. See *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.). The exemption for veterans' organizations under Section 501(c)(19) is largely based on their mutual character. See S. Rep. No. 92-1082, 92d Cong., 2d Sess., pp. 1-3. In any event, labor and veterans' organizations are still subject to limitations on lobbying such as those set forth in *Slee, supra*. And several veterans' organizations are prohibited by statute from engaging in political activities. *E.g.*, Act of September 16, 1919, c. 59, 41 Stat. 284, 285, Sec. 6 (American Legion); Act of August 27, 1958, Pub. L. 85-769, 72 Stat. 922, 926, Sec. 10 (Blinded Veterans Association); Act of August 26, 1958, Pub. L. 85-761, 72 Stat. 854, 858, Sec. 10 (Military Order of the Purple Heart of the United States of America); Act of July 23, 1947, c. 298, 61 Stat. 403, 406, Sec. 5 (AMVETS). Numerous other non-profit organizations are expressly prohibited from engaging in political activities. *E.g.*, Act of August 6, 1956, c. 976, 70 Stat. 1052, 1055, Sec. 10 (Boys Clubs of America); Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 367, Sec. 201 (Corporation for Public Broadcasting).

devoted to lobbying, and whether participation in those activities is by the leadership, members, or outsiders;[7] the amount of money budgeted for political activities and the amount actually expended;[8] the number of programs and activities devoted to lobbying;[9] and whether the lobbying activities were sporadic, incidental or casual or, instead, regular, formal and purposeful.[10]

This Court has specifically held that similar statutory "substantial" guidelines are not unconstitutionally vague. See, *e.g.*, *Board of Governors* v. *Agnew*, 329 U.S. 441, and *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 48-49. The statutory term "substantial" is not "so vague that 'men of common intelligence must necessarily guess at its meaning' " (*Broadrick* v. *Oklahoma*, 413 U.S. 601, 607),

---

[7]Statement of Assistant Commissioner Norman A. Sugarman in Hearings before the House Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, on H. Res. 217, Tax-Exempt Foundations, 83d Cong., 2d Sess., 423, 433-434.

[8]*Seasongood* v. *Commissioner, supra; Kuper* v. *Commissioner, supra; League of Women Voters of U.S.* v. *United States*, 180 F. Supp. 379 (Ct. Cl.); Caplin, *Limitations on Exempt Organizations: Political and Commercial Activities*, N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations, 265, 274.

[9]Statement of the Commissioner of Internal Revenue, Hearings before Subcommittee of the House Committee on Appropriations, on Department of Treasury, Executive Office of the President, and Related Agencies Appropriations for 1968, 90th Cong., 1st Sess. 536 (February 17, 1967).

[10]Letter ruling addressed to the Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664. See, also, *Liberty Nat. Bank & Trust Co.* v. *United States*, 122 F. Supp. 759 (W.D. Ky.).

even though "marginal cases could be put where doubts might arise" (*United States Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 579, quoting *United States* v. *Harriss*, 347 U.S. 612, 618).[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LEONARD J. HENZKE, JR.,
Attorney.

DECEMBER 1974.

---

[11]The constitutional rationale of the court of appeals in *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169 (C.A. D.C.), reversed on jurisdictional grounds *sub nom. Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, does not support petitioner here, for the constitutional issue the court discussed involved the impact of the "substantiality" test upon small exempt organizations. Moreover, contrary to petitioner's suggestion (Pet. 3, 21), the government did not argue in *"Americans United"* that review of the constitutional issue was appropriate but only that a refund suit could test the issue. Petitioner here has obtained his day in court on the constitutional issues and has lost; no further review is appropriate.